Comau, Inc. *and* Automated Systems Workers Local 1123, affiliated with Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America

Comau Employees Association *and* Automated Systems Workers Local 1123, affiliated with Carpenters Industrial Council, United Brotherhood of Carpenters and Joiners of America. Cases 07–CA–052614, 07–CA–052939, and 07–CB–016912

June 27, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On December 21, 2010, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondents, Comau, Inc. (Comau) and Comau Employees Association (the CEA), and the Acting General Counsel each filed exceptions, a supporting brief, an answering brief, and a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

This matter arises out of Comau's withdrawal of recognition from the Automated Systems Workers Local 1123, affiliated with the Michigan Regional Council of Carpenters (the ASW/MRCC), and recognition of the CEA as the exclusive collective-bargaining representative of a unit of employees at Comau's Southfield and Novi, Michigan facilities. For the reasons explained below, we reverse the judge's findings that Comau violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the ASW/MRCC and that Comau and the CEA violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2), respectively, by extending and accepting recognition, and by entering into a collective-bargaining agreement containing a union-security clause at a time when the CEA did not represent an uncoerced majority of the employees in the bargaining unit. However, we affirm the judge's findings that Comau and the CEA unlawfully coerced employees to sign dues-checkoff authorization forms.

For many years, unit employees at Comau's Southfield and Novi facilities were represented by an in-house union, originally called the PICO Employees Association (the PEA) and later renamed the Automated Systems Workers Union (ASW). In 2007, the ASW affiliated with the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (MRCC). In January 2008, Comau and the ASW/MRCC began negotiations for a successor collective-bargaining agreement. Healthcare was a contentious issue throughout the negotiations. Comau proposed replacing the unit employees' existing healthcare plan with the same plan that it provided to its nonunit employees. Under the plan proposed by Comau, unit employees would be required to pay premiums for the first time. The ASW/MRCC proposed that Comau participate in a plan underwritten by the MRCC, which could be offered to employees at no cost. On December 3, 2008, Comau declared impasse and announced that it was implementing its final offer. Comau informed unit employees, however, that the new healthcare plan would not become effective until March 1, 2009. Notwithstanding Comau's declaration of impasse, the parties continued to meet and negotiate over the ASW/MRCC's healthcare proposal. Although the parties made significant progress in the negotiations, on March 1, Comau put into effect the healthcare plan in its final offer.

On November 5, 2010, the Board issued a Decision and Order reported at 356 NLRB 75 (*Comau I*), finding that any impasse that existed over healthcare on December 3, 2008, when Comau announced that it was implementing its final offer, was broken as a result of the parties' subsequent progress in negotiations. The Board therefore found that Comau violated Section 8(a)(5) and

[1] Comau also filed a motion to dismiss the complaint and the Acting General Counsel filed a brief in opposition to the motion.

[2] On January 3, 2012, the Board issued a Decision and Order in which it adopted the decision of the administrative law judge and ordered the Respondents to take the action set forth in the judge's recommended Order. 357 NLRB 2294. The January 3, 2012 Decision and Order stated that the CEA did not file exceptions to the judge's decision. Id. at 2294 fn. 1. However, the Board had received, but through inadvertence was not aware of, the CEA's exceptions and briefs, which had been timely filed. Accordingly, on February 8, 2012, the Board issued an unpublished order vacating the earlier Decision and Order and stating that the Board would reconsider the case de novo and issue a new decision and order at a later date.

[3] Comau has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We shall modify the judge's recommended Order and substitute a new notice to conform to the violations found. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

(1) of the Act by implementing the new healthcare plan in the absence of an agreement or a bona fide impasse.

On December 22, 2009, while *Comau I* was pending before the administrative law judge, Comau withdrew recognition from the ASW/MRCC and granted recognition to the CEA, based on a disaffection petition signed by a majority of the bargaining unit members. Comau and the CEA subsequently negotiated a collective-bargaining agreement, which by its terms is effective from December 22, 2009, to April 13, 2013. The complaint in this case followed.

The judge, applying the multifactor test set forth in *Master Slack Corp.*, 271 NLRB 78 (1984), found that the unremedied unfair labor practice found in *Comau I* tended to undermine the ASW/MRCC in the eyes of the bargaining unit employees and thereby tainted the disaffection petition. Accordingly, the judge found that Comau could not lawfully rely on the petition to withdraw recognition from the ASW/MRCC, and that, in so doing, it violated Section 8(a)(5) and (1) of the Act. The judge further found that Comau and the CEA, respectively, violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) by extending and accepting recognition and entering into a collective-bargaining agreement.

On March 2, 2012, the United States Court of Appeals for the District of Columbia Circuit granted Comau's petition for review of the Board's decision in *Comau I* and vacated the Board's finding that Comau committed an unfair labor practice by unilaterally changing employees' healthcare benefits. *Comau, Inc. v. NLRB*, 671 F.3d 1232.[5] The court found that Comau and the ASW/MRCC had bargained to impasse and that Comau lawfully implemented the change in healthcare benefits along with the other terms of its final offer. In light of the court's decision, we reverse the judge and find that the disaffection petition was not tainted by the unilateral change at issue in *Comau I*.

2. The Acting General Counsel alleged and litigated an alternative theory for finding that Comau could not lawfully rely on the disaffection petition to withdraw recognition from the ASW/MRCC. The Acting General Counsel alleged that the petition was tainted because it was circulated by nonsupervisory lead employees acting with the apparent authority of Comau. The judge found it unnecessary to pass on this theory due to his finding that the petition was tainted by the unilateral change in healthcare benefits.[6] Having reversed the judge on that issue, we must address the Acting General Counsel's alternative theory.

As detailed in the judge's decision, Comau's Southfield and Novi facilities are divided into separate departments that are led by one or more supervisors. The departments are further divided into work centers, each of which has an assigned leader who is highly skilled and experienced in the work of the center. The leaders are part of the bargaining unit and the Acting General Counsel does not allege that they are statutory supervisors. The judge found, however, that the leaders act as intermediaries between management and employees on the shop floor. Managers determine the work that is assigned to each work center and communicate the information to the leaders. Leaders then assign specific tasks to individual employees and provide instructions about how the tasks should be performed. Leaders may request specific employees to be assigned to a project.[7] Leaders keep management informed about the status of projects through reports and periodic meetings. If management decides to authorize overtime for a project, leaders may recommend employees to perform the overtime work and notify the employees who have been selected by management to work the overtime hours. Employees wishing to take a day off must obtain their leader's signature on an absentee form before the form is submitted to a supervisor for final signature and approval. In some instances, the leader is the only individual who signs an absentee form. Leaders receive a slightly higher wage (approximately $1 additional per hour) than other unit employees.

Harry Yale, a toolmaker leader, prepared and circulated the disaffection petition. The petition requested that Comau stop recognizing the ASW/MRCC and grant recognition to the CEA as the employees' collective-bargaining representative. On December 15, 2009, Yale placed the petition on his desk for employees to review and sign during break periods and before and after work. Yale also took the petition to other buildings where unit employees worked. The employees in those buildings passed the petition around, occasionally during working time in violation of Comau's no-solicitation rule. Addi-

[5] On March 8, 2012, Comau filed a motion to dismiss the complaint on the basis that the D.C. Circuit's decision in *Comau I* precludes adoption of the judge's findings and conclusions in this case. The Acting General Counsel filed an opposition. We deny the motion. The court's decision has no bearing on the judge's findings, discussed below, that Comau and the CEA unlawfully coerced employees to sign dues-checkoff authorization forms, nor does it have any bearing on the Acting General Counsel's allegation that the petition was tainted by the involvement of individuals acting with the apparent authority of Comau.

[6] The judge, however, made factual findings relevant to the theory. Accordingly, the record is sufficiently developed so that a remand is unnecessary.

[7] At least one leader, James Reno, has also participated in the hiring process by reviewing resumes and providing his opinion about the applicants' ability to operate boring mills.

tionally, an unknown number of unit employees on layoff or medical leave entered the facilities to sign the petition.

Although the disaffection petition was generally circulated with little discussion, employee Rich Mroz testified that his group leader, Nelson Burbo, informed him of the petition and asked if he was happy with the ASW/MRCC. Mroz responded that he was not, but he thought it was a bad time to change bargaining representatives, due to the then-pending unfair labor practice proceeding in *Comau I*. Subsequently, Leader James Reno suggested that Mroz speak with Yale about the petition. Mroz did so, asking Yale if other leaders or Mroz' brother, who also worked for Comau, had signed the petition. Yale replied that they, and a majority of the other unit employees, had signed. Mroz then signed the petition. He testified that his decision to sign the petition was influenced by his leaders' support of the petition and the fact that a majority of the bargaining unit employees, including his brother, had signed it.

On December 22, 2009, Yale delivered the petition to Human Resources Manager Fred Begle. Begle verified the signatures and determined that a majority of the bargaining unit employees had signed it. On the same day, Comau withdrew recognition from the ASW/MRCC and granted recognition to the CEA.

The Acting General Counsel contends that Yale, Reno, and Burbo possessed apparent authority to act for Comau when they circulated the disaffection petition, in light of their duties and the manner in which the petition was circulated—i.e., on working time and to off-duty employees who were permitted to enter the facilities.[8] Comau and the CEA maintain, on the other hand, that the leaders were acting as agents of the CEA.[9]

The Board applies common law principles in determining whether an individual possesses apparent authority to act for an employer. The Board summarized these principles in *Pan-Oston Co.*, 336 NLRB 305, 305–306 (2001):

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp*., 315 NLRB 725 (1994) (and cases cited therein). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988) (citing Restatement 2d, *Agency*, § 27 (1958, Comment a)).
>
> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB [425, 426–427 (1987)] (and cases cited therein). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982).

The Board also emphasized in *Pan-Oston* that an employee may be an agent of an employer for one purpose but not another. 336 NLRB at 306.[10]

Applying these principles here, we find that the Acting General Counsel, who bears the burden of proof, failed to establish that Comau took any action from which employees could reasonably conclude that Yale, Reno, and Burbo were reflecting company policy or speaking and acting for Comau when they circulated the petition. There is no evidence that Comau intended to cause employees to believe that it had authorized Yale, Reno, and Burbo to circulate the petition or that Comau should have realized that its conduct was likely to create such a belief. Although it appears that Begle was informed by Yale on an unknown date that the petition was circulating, there is no evidence that Comau instigated or encouraged the petition. Further, there is no evidence that Comau was aware that some employees signed the petition during working time in violation of Comau's no-solicitation rule or that it was aware that off-duty employees entered the facility to sign the petition.[11]

Moreover, as indicated above, leaders are members of the bargaining unit and for many years have held elected or appointed positions in the PEA, ASW, ASW-MRCC, and the CEA. Yale, for example, had served as secretary of the PEA and the ASW, as a member of the ASW/MRCC executive committee, and as a member of

[8] The Acting General Counsel does not allege that Comau violated Sec. 8(a)(1) of the Act by actively soliciting, encouraging, or promoting the petition.

[9] Comau and the CEA further contend that an individual cannot be an agent of an employer and a union at the same time.

[10] See also *Flying Foods*, 345 NLRB 101, 104–105 (2005), enfd. 471 F.3d 178 (D.C. Cir. 2006) (employee was employer's agent with respect to his statements critical of the union during new employee orientation seminars, but he was not shown to have been acting on behalf of the employer when he solicited employees to sign a disaffection petition approximately 1 week later).

[11] *Flying Foods*, supra, 345 NLRB at 105 (employee's circulation of petition in violation of no-solicitation rule in area where he *could* have been observed by supervisor did not create apparent authority where there was no evidence that any supervisor actually saw him).

the ASW/MRCC bargaining committee during negotiations in 2008. Darryl Robertson served as treasurer of the ASW and a member of the ASW/MRCC bargaining committee during the 2008 negotiations, and Leaders Greg Sobeck, Steve Wizinsky, and Robert Wisniewski have also held various elected or appointed positions with the ASW/MRCC. In light of the leaders' status as unit employees and their history of serving as union officials with responsibility for representing employees in labor relations matters, we cannot conclude that the employees would view the leaders' circulation of the petition as having been undertaken at the behest of Comau or in furtherance of Comau's interests, as opposed to the interests of the unit employees.[12] Rather, we find that employees would reasonably be able to distinguish between activities undertaken by the leaders in connection with their limited agency to direct the work of others, and activities undertaken in connection with their role as unit employees or union officials.

In sum, we find that there is insufficient evidence that the disaffection petition was tainted under either of the theories advanced by the Acting General Counsel. Consequently, Comau did not improperly rely on the disaffection petition to withdraw recognition from the ASW/MRCC and to recognize the CEA as the employees' majority choice for collective-bargaining representative. We therefore dismiss the complaint allegations that Comau violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the ASW/MRCC, and that Comau and the CEA, respectively, violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) by extending and accepting recognition, and by entering into a collective-bargaining agreement containing a union-security clause at a time when the CEA did not represent an uncoerced majority of the employees in the bargaining unit.

[12] This factor sharply distinguishes this case from *SKC Electric, Inc.*, 350 NLRB 857 (2007), cited by the Acting General Counsel. In *SKC Electric*, an individual in charge of overseeing the employer's projects circulated and filed a decertification petition. The Board found that, even assuming the individual was not a statutory supervisor, the employees would reasonably believe he was speaking and acting for management in circulating the decertification petition in light of his duties and the fact that he drove a company truck from jobsite to jobsite to collect signatures during working time. In contrast to the present case, the individual who circulated the petition in *SKC Electric* did not have a history of representing unit employees in labor relations matters as an appointed or elected union agent. *SKC Electric* is further distinguishable on the basis that the employer in that case materially assisted in the creation, circulation, and filing of the petition. 350 NLRB at 861–862. As indicated above, there is no evidence in this case that Comau assisted in the creation, circulation, or filing of the petition or that it knew the petition was circulated on working time.

3. We agree with the judge, for the reasons he set forth, that Comau violated Section 8(a)(1) of the Act by threatening employees Nizar Akkari and Gasper Calandrino with discipline or discharge if they did not execute dues-checkoff authorization forms for the CEA. We further agree with the judge, for the reasons he gave and for the additional reasons set forth below, that Comau and the CEA violated Section 8(a)(1) and Section 8(b)(1)(A), respectively, by making statements and engaging in other conduct that had a reasonable tendency to coerce employee Jeffrey T. Brown to execute a dues-checkoff authorization form.

An employer may not lead employees to believe that the dues-checkoff authorization method of fulfilling financial obligations to their union is compulsory. *Rochester Mfg. Co.*, 323 NLRB 260 (1997). The Board has repeatedly held that "the Act guarantees to each employee the right to determine for himself, free from coercion, whether he shall sign a checkoff authorization or not." *Herman Bros., Inc.*, 264 NLRB 439, 442 (1982).[13] "Any conduct, express or implied, which coerces an employee in his attempt to exercise this right clearly violates [the Act]." *Electronic Workers IUE Local 601 (Westinghouse Electric Corp.)*, 180 NLRB 1062 (1970).

The credited facts establish that, beginning in February 2010, CEA Treasurer Fred Lutz repeatedly asked Brown to execute a dues-checkoff authorization form. The first time Lutz asked, Brown said that he did not want to and would not sign a dues-checkoff authorization form. Lutz then informed Brown that he was going to provide Begle with a list of all employees who did not sign the form. Brown responded that he would sign if Begle gave him a letter stating that his job was at risk if he did not. Lutz approached Brown three more times. The final time, Brown asked if he could pay his dues in cash. Lutz replied that he would ask Begle. A few minutes later, Lutz returned and told Brown that they both needed to speak with Begle in Begle's office. At the meeting, Begle pointedly asked Brown why he did not want to execute a dues-checkoff authorization form. Brown responded that the Company was already into his paycheck enough. Brown stated that he would rather pay his dues in cash, and Begle responded that "he didn't want [CEA officials] running around once a month collecting 20 bucks from everybody." Brown then asked if he could pay a full year of dues in cash. Begle appeared to like the proposal, but Lutz asked Brown what would happen if he was laid off in 6 months. The conversation contin-

[13] Quoting *Baggett Industrial Constructors*, 219 NLRB 171, 172 (1975); *Hope Industries*, 198 NLRB 853, 856 (1972).

ued for a few more minutes, and then Brown handed in a signed dues-checkoff authorization form.

The judge found that, although Begle did not expressly threaten Brown with adverse consequences if he failed to sign a dues-checkoff authorization form (as he had when threatening employee Akkari with termination if he failed to sign the form), Begle's statements and conduct would reasonably tend to coerce Brown in the exercise of his Section 7 rights in view of (1) Begle's taking the unusual step of having a shop floor employee brought to his private office to speak with him; and (2) his questioning of Brown about his refusal to sign the form, while expressing doubts about the reliability of paying by other means.[14] The judge found, further, that Lutz' presence at the meeting served as the CEA's endorsement of Begle's remarks and his treatment of Brown's refusal to sign the dues-checkoff authorization form as a point of concern. The judge observed that, like Begle, Lutz questioned the reliability of paying dues by means other than dues checkoff. Accordingly, the judge found that Lutz' statements and conduct also had a reasonable tendency to coerce Brown to sign the dues-checkoff authorization form, and thus violated Section 8(b)(1)(A) of the Act.

We agree with the judge, for the reasons he states, that Begle's statements and conduct were coercive. We also agree that the CEA, through Lutz, similarly coerced Brown. As found by the judge, Lutz' presence at the meeting served to endorse Begle's statements and conduct. It also provided the CEA with knowledge that Brown's authorization was coerced. The Board has long held that a union violates Section 8(b)(1)(A) by accepting money deducted pursuant to authorizations that it has reason to know were coercively obtained, even if the union was not directly responsible for the coercion. *Irwin Industries*, 304 NLRB 78 fn. 1 (1991) (adopting judge's finding that union violated 8(b)(1)(A) by accepting checked-off dues while on notice that they had been deducted pursuant to coerced authorizations), enfd. in relevant part sub nom. *Petroleum Workers v. NLRB*, 980 F.2d 774, 778 fn. 1 (D.C. Cir. 1992); *Herman Bros.*, supra,, 264 NLRB at 442 fn. 16 (holding that employer violated 8(a)(1) by coercing employees to sign authorization cards and further finding "[a]s a corollary to this violation, . . . that [the union] violated Section 8(b)(1)(A) by accepting money deducted pursuant to the coercively obtained authorizations"); *IBEC Housing Corp*., 245 NLRB 1282, 1283 (1979) (same).[15]

[14] Member Hayes finds it unnecessary to pass on whether Begle again violated Sec. 8(a)(1) through his statements and conduct towards Brown because an additional finding would be cumulative and would not materially affect the remedy.

AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order Comau to cease giving effect to the coercively obtained authorization cards, upon the requests of Nizar Akkari, Gasper Calandrino, and Jeffrey T. Brown. However, we shall not require the Respondents to reimburse Akkari, Calandrino, and Brown for dues deducted pursuant to the unlawfully obtained authorizations. Throughout the relevant period, Comau and the CEA have been parties to a collective-bargaining agreement covering these employees. The agreement contains a union-security provision that appears to comply with the requirements of the Act. The agreement itself is presumptively valid in light of our dismissal of the complaint allegations that Comau unlawfully extended, and the CEA unlawfully accepted, recognition. Under these circumstances, because the employees were obligated to pay dues by some method, a reimbursement order would not be appropriate. *Rochester Mfg*., supra, 323 NLRB at 263 (no reimbursement required if affected employees

[15] On June 9, 2010, Comau posted a notice informing employees that the ASW had charged it with unlawfully coercing employees into signing dues-checkoff authorization forms. The notice stated that Comau did not believe the charge to be accurate and went on to advise employees that they were not required to pay their dues through payroll deduction and that they were free to rescind their dues-checkoff authorizations and "deal with the CEA directly." We agree with the judge that the notice did not serve as an effective repudiation under the standards enunciated in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The notice did not specifically reference the threats of discipline or the other coercive statements and conduct and it denied any wrongdoing.

Member Hayes does not necessarily endorse all elements of the *Passavant* test, but he agrees that Comau did not effectively repudiate its threats of discipline or discharge to employees Nizar Akkari and Gasper Calandrino if they refused to execute dues-checkoff authorization forms.

However, even assuming arguendo that Comau, through Begle. coerced Brown to execute his dues-checkoff authorization, Member Hayes would not find that Lutz' involvement in the Begle-Brown meeting is a sufficient basis for finding that the CEA violated Sec. 8(b)(1)(A). Moreover, although Member Hayes agrees with the cited holding of *Irwin Industries*, he notes that there is neither an allegation nor a finding in this case that the CEA violated Sec. 8(b)(1)(A) by knowingly accepting coerced checked-off dues.

were subject to a lawful union-security clause obligating them to pay dues); *Electronic Workers IUE Local 601 (Westinghouse Electric)*, supra, 180 NLRB at 1062–1063 (same).

ORDER

A. The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent Employer, Comau, Inc., Southfield and Novi, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that they can be disciplined or discharged if they do not sign dues-checkoff authorization forms.

(b) Making statements or engaging in conduct that has a reasonable tendency to coerce employees to sign dues-checkoff authorization forms.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Cease giving effect to the checkoff authorizations obtained through coercion from Nizar Akkari, Gasper Calandrino, and Jeffrey T. Brown upon the request of those employees.

(b) Within 14 days after service by the Region, post at its facilities in Southfield and Novi, Michigan, copies of the attached notice marked "Appendix A—Notice to Employees."[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Comau's authorized representative, shall be posted by Comau and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if Comau customarily communicates with its employees by such means. Reasonable steps shall be taken by Comau to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Comau has gone out of business or closed the facilities involved in these proceedings, Comau shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Comau at any time since May 1, 2010.

(c) Post at the same places and under the same conditions copies of the notice marked "Appendix B—Notice to Members and Employees" as soon as they are forwarded by the Regional Director for Region 7.

(d) Within 14 days after service by the Region, deliver to the Regional Director for Region 7 signed copies of the attached notice marked "Appendix A—Notice to Employees" in sufficient numbers to be posted by the CEA in places where notices to its members are customarily posted.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Comau has taken to comply.

B. The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent Union, Comau Employees Association (CEA), Southfield, Michigan, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Making statements or engaging in conduct that has a reasonable tendency to coerce Comau employees to sign dues-checkoff authorization forms.

(b) Accepting and retaining moneys deducted from employees' pay as dues where it has knowledge that such deductions were made pursuant to coercively obtained dues-checkoff authorization forms.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union offices and meeting halls copies of the attached notice marked "Appendix B—Notice to Members and Employees."[17] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the CEA's authorized representative, shall be posted by the CEA and maintained for 60 consecutive days in conspicuous places including all places where notices to members and Comau employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the CEA customarily communicates with its members by such means. Reasonable steps shall be tak-

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[17] See fn. 16, supra.

en by the CEA to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Post at the same places and under the same conditions copies of the notice marked "Appendix A—Notice to Employees" as soon as they are forwarded by the Regional Director for Region 7.

(c) Within 14 days after service by the Region, deliver to the Regional Director for Region 7 signed copies of the attached notice marked "Appendix B—Notice to Members and Employees" in sufficient numbers to be posted by Comau in places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the CEA has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that they may be disciplined or discharged if they do not sign dues-checkoff authorization forms.

WE WILL NOT make statements or engage in conduct that has a reasonable tendency to coerce employees to sign dues-checkoff authorization forms.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL cease giving effect to the dues-checkoff authorization forms obtained through coercion from Nizar Akkari, Gasper Calandrino, and Jeffrey T. Brown upon the request of those employees.

COMAU, INC.

APPENDIX B

NOTICE TO MEMBERS AND EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make statements or engage in conduct that has a reasonable tendency to coerce Comau employees to sign dues-checkoff authorization forms.

WE WILL NOT accept and retain moneys deducted from your pay as dues where we have knowledge that such deductions are made pursuant to coercively obtained dues-checkoff authorization forms.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

COMAU EMPLOYEES ASSOCIATION

Sarah Pring Karpinen and *Darlene Haas Awada, Esqs.,* for the Acting General Counsel.

Thomas G. Kienbaum and *Theodore R. Opperwall, Esqs.,* of Birmingham, Michigan, for the Respondent Employer (Comau).

M. Catherine Farrell and *David J. Franks, Esqs.,* of Bloomfield Hills, Michigan, for the Respondent Union (CEA).

Edward J. Pasternak, Esq., of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Detroit, Michigan, from August 31–September 3, 2010, and from September 16–17, 2010. The charge in Case 7–CA–52614 was filed on December 29, 2009, and was amended on January 8, 2010. The charge in Case 7–CA–52939 was filed on May 20, 2010, and was amended on July 8, 2010, and further amended on July 23, 2010. The charge in Case 7–CB–16912 was filed on May 20, 2010, and was amended on June 9, 2010, and further amended on July 8, 2010. The consolidated amended complaint was issued on July 30, 2010, and alleges that Comau, Inc. (Comau or Respondent Employer (RE)) violated Section 8(a)(1), (2), (3), and (5) of the Act by: failing and

refusing to bargain collectively and in good faith with the Automated Systems Workers Local 1123 (ASW, ASW/MRCC[1] or the Charging Party); dominating and interfering with the administration of, and rendering unlawful assistance to, a labor organization; discriminating against employees and thus encouraging membership in a labor organization; and interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act. The consolidated amended complaint also alleges that the Comau Employees Association (CEA or Respondent Union (RU)) violated Section 8(b)(1)(A) and (b)(2) of the Act by: restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act; and attempting to cause Comau to discriminate against its employees such that Comau would violate Section 8(a)(3) of the Act.

Both Comau and the CEA filed timely answers denying the alleged violations in the consolidated amended complaint.

This case follows on the heels of Case 07–CA–052106, decided by Administrative Law Judge Paul Bogas on May 20, 2010, and adopted by the Board on November 5, 2010. See *Comau, Inc.*, 356 NLRB 75 (2010). During trial, I took judicial notice of the legal and factual findings in Judge Bogas' decision, and advised the parties that they could make any relevant arguments about those findings (including the weight that the findings should carry). Those findings became binding authority when the Board affirmed Judge Bogas' rulings, findings, and conclusions, and adopted his remedy and recommended Order (with minor modifications to each that are not relevant to my analysis).

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs[3] filed by the Acting General Counsel, Respondent Employer, and Respondent Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer Comau operates plants in the Detroit, Michigan area to design, build, sell, and install automated industrial systems. In 2009, Respondent Employer derived gross revenue in excess of $1 million, and sold goods and provided services valued in excess of $50,000 from its Michigan facilities directly to customers located outside of Michigan. Respondent Employer admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent Union admits, and I find, that at all material times it has been a labor organization within the meaning of Section 2(5) of the Act. I also find that, at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.[4]

---

[1] The ASW/MRCC abbreviation is used for all time periods during which the ASW was affiliated with the MRCC.

[2] The trial transcript is generally accurate, but I make the following corrections to clarify the record: (a) at Tr. 203–845, all references to "Harry Hale" should read "Harry Yale"; (b) at Tr. 484, L. 23, "away" should be "weight"; (c) at Tr. 601, L. 1, "Carey" should be "Harry"; (d) at Tr. 643, L. 3, "not" should be "reflect"; (e) at Tr. 797, L. 19, "Kim Kayka" should be "Jim Kayko." In addition, at various points in the transcript, the record did not record (or mislabeled) the Charging Party's attorney's (Ed Pasternak) responses to my inquiries about objections to exhibits. The record should reflect that I admitted the following two exhibits into evidence over the Charging Party's objection: RE. Exhs. 12, 15. Finally, I note that while the exhibit files generally are correct, I excluded Acting GC Exhs. 22 and 25–30 from the record (those exhibits were erroneously placed in the admitted exhibits file).

[3] I have also considered the posttrial motions filed by the parties. The Acting General Counsel filed a motion to substitute the table of contents and table of authorities in its posttrial brief. Given the fact that the Acting General Counsel only seeks to make clerical corrections to its brief, and given that no other party has opposed the motion, I will grant the Acting General Counsel's request and will include the revised table of contents and table of authorities in the posttrial materials that will be forwarded to the Board if any exceptions are filed.

On October 8, 2010, Comau filed a motion to supplement the record with the transcript and exhibits from an October 5, 2010 deposition of David Baloga in connection with a 10(j) petition that is currently pending in the United States District Court for the Eastern District of Michigan. The proffered records included cover sheets from the ASW/MRCC's meetings in 2008 (showing the number of members who attended each meeting), and David Baloga's posttrial deposition testimony about those documents. The Acting General Counsel opposed Comau's motion, and I denied Comau's motion to supplement the record in an order dated October 14, 2010.

In its posttrial brief, Comau (in part) asked me to reconsider my ruling on its motion to supplement the record. See RE. Br. at 15. The Acting General Counsel, meanwhile, filed a motion to strike sec. C of Comau's posttrial brief on the theory that Comau argued evidence that is outside of the record. Given these filings, I have reviewed my decision to deny Comau's motion to supplement the record, and I stand by my decision to deny Comau's motion to supplement. Comau made a strategic decision during trial *not* to introduce the ASW/MRCC 2008 meeting attendance figures into evidence, and it cannot now introduce a new issue at trial that it could have litigated in the original hearing. See RE. Br. at 14; compare *Winkle Bus Co.*, 347 NLRB 1203, 1211 fn. 4 (2006) (ALJ permitted the General Counsel to supplement the record with an exhibit that, by prior agreement, the Respondent did not provide until after trial, and that corrected an error in another exhibit already admitted into the record). More important, however, the issue is moot. As noted below, I have determined that although meeting attendance figures may be relevant as a general matter to showing a causal link between an unfair labor practice and a subsequent loss of union support (see *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the limited ASW/MRCC meeting attendance figures that were admitted into evidence in this case are not sufficiently reliable for me to draw any meaningful conclusions about whether the various attendance fluctuations resulted from Comau's unfair labor practice. See infra, fn 15.

Finally, I have decided to grant in part and deny in part the Acting General Counsel's motion to strike sec. C of Comau's posttrial brief. Baloga's posttrial affidavit has not been admitted into the record, and thus I will strike the portions of Comau's brief that refer to the affidavit's contents. See RE. Br. at 15. Similarly, I will strike the portions of Comau's brief that characterize the contents of RE. Exh. 11, because the contents of that rejected exhibit were never placed on the record. See RE. Br. at 14. The Acting General Counsel's motion to strike is denied as to the remaining portions of sec. C of Comau's brief, because the remaining portions of sec. C are arguments that Comau made in anticipation of a contrary argument that the Acting General Counsel might make in its own posttrial brief.

[4] Both Comau and the CEA admit that from 2001 to March 2007, the ASW (formerly known as the PICO Employees Association) was a

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

A. Comau's Organizational Structure

Comau, Inc. designs and builds automated equipment (tooling systems, robotic applications, etc.) for a variety of customers, including Chrysler, General Motors, and Ford Motor Company. Comau's headquarters are located in Southfield, Michigan, and additional facilities are located in Novi, Michigan. (Tr. 102, 573–576.)

At each facility, Comau generally has departments that are led by supervisors. Each department is separated into work centers (or teams), each of which has an assigned "leader" who (among other qualifications) is able to provide team and individual leadership for the other employees in the work center, and is highly skilled and experienced in the work that employees carry out in the work center.[5] (Tr. 580, 594–595, 599; GC Exh. at 45–52.) There are approximately 30 leaders in the bargaining unit, each of whom receives a slightly higher wage (approximately $1 additional per hour) for performing the leader position.[6] (Tr. 592–593.) Several leaders have simultaneously served as union officers. (Tr. 123–126, 384–385, 1044–1045.)

When projects come to Comau, the design group outlines the project as a whole, and then managers assign the work needed to complete that project to one or more of the work centers. (Tr. 590–591.) As the project proceeds, leaders receive instructions through an automated computer system, and then communicate those instructions to the individual workers on their teams. (Tr. 600–601.)

Leaders perform a variety of functions in connection with their role as the intermediaries between the employees in their work centers and management. When they first receive work assignments and the corresponding blueprints, leaders may request specific employees to be assigned to their teams. (Tr. 601, 604, 1005.) Leaders also attend a project kickoff meeting with a representative from management and the project manager. (Tr. 609, 873, 1005.) Once the leader's team is assembled, the leader assigns specific tasks to individual employees. (Tr. 266–267, 606, 682, 874, 1140–1141.) As the team members carry out their assignments, the leader facilitates the overall project by consulting with the designers as needed, and providing instructions to the team members about new assignments, work revisions and corrections, or about how specific tasks should be performed. (Tr. 165, 189, 216–217, 270–272, 340–341, 437–438, 445–446, 606, 1008.) Leaders also stay in contact with management by attending weekly leader meetings and periodic manpower meetings, and by providing verbal updates. (Tr. 256, 424–425, 440–441, 608, 610–611.)[7]

Leaders also serve as the beginning and end points for communication between employees on the shop floor and management. Leaders generally initiate nonconformance reports to advise management (via a computer database) about problems or defects in work product that require additional time or money to repair. (Tr. 697–700.) When management decides to authorize overtime for a project, leaders may recommend employees to perform the overtime work, and leaders notify the individual employees who have been selected to work the overtime hours. (Tr. 167, 275–277, 443, 612–613, 689–690; GC Exh. 5.) Similarly, employees wishing to take a day off must first obtain their leader's approval (and signature on an "absentee report" form) before the paperwork is forwarded to the shop foreman (or another supervisor) for final signature and approval. (Tr. 272–273, 615, 618–619; Respondent Employer (RE.) Exh. 14.) In some instances, employee leave requests have been approved without obtaining the supervisor's signature, leaving the leader as the only individual to sign the request. (Tr. 620–621; GC. Exhs. 40 (Grayson); 41 (Sobeck); and 42 (Constantine).)[8]

B. Union History at Comau

For a number of years (dating back to at least the 1980s), the PICO Employees Association (PEA) served as the exclusive collective bargaining representative for all full-time and regular part-time production and maintenance employees, inspectors and field service employees (hereafter, the bargaining unit) at Comau (and at Comau's predecessor, Progressive Tool and Industries Co. (PICO)).[9] (Tr. 102–103, 236, 861.) The PEA

labor organization within the meaning of the Act. Testimony presented at trial demonstrated (without dispute) that the ASW continued its status as a labor organization from March 2007 to the present. Tr. pp. 103–104, 367. On March 1, 2010, the ASW changed its affiliation from the Michigan Regional Council of Carpenters (MRCC) to the Carpenters Industrial Council (CIC). Notwithstanding this change, the ASW continued its affiliation with the United Brotherhood of Carpenters, and retained its same officers. Tr. 104.

[5] Many of the shop floor employees also have several years of experience, though they have not taken on the role of leader. Tr. 602.

[6] Before March 2001, leaders were identified as supervisors in the collective-bargaining agreement. Tr. 969. That changed in March 2001 (at the Union's request), when the new collective-bargaining agreement was modified to describe leaders as employees who take on the responsibility of individual and team leadership in particular areas. Tr. 969–970; Respondent Union (RU.) Exh. 9 at 43–47.

[7] To carry out these responsibilities, leaders are provided some equipment that is not generally provided to other employees on the shop floor. Specifically, leaders have desks on the shop floor, telephones, and have computers with password access requirements. Tr. 264, 647–648, 653, 701, 995, 999–1000, 1006, 1008–1010.

[8] Occasionally, Comau has called upon individual leaders to take on specific additional responsibilities. For example, in connection with its hiring decisions, management asked Leader James Reno to review applicant résumés and provide his opinion about the applicant's ability to operate the company's boring mills. Tr. 658–659, 669; GC Exhs. 46–48. In another instance, Leader Nelson Burbo communicated with an outside vendor to arrange a meeting about options for upgrading the Company's equipment. Tr. 695; GC Exh. 50.

[9] During the relevant time period, the bargaining unit was defined as: "[a]ll full-time and regular part-time production and maintenance employees, inspectors and field service employees, employed by [Comau] at and out of its facilities located at 20950, 21000, and 21175 Telegraph Road, Southfield, Michigan; and 42850 West Ten Mile Road, Novi, Michigan; and machinists currently working at its 44000 Grand River, Novi, Michigan facility who formerly worked at its facility located at 21175 Telegraph Road, Southfield, Michigan; but excluding all office clerical employees, and guards and supervisors as defined in the Act." *Comau*, 356 NLRB at 76 fn. 2. The current bargaining unit is substantially similar, though the language was modified slightly after Comau

was not affiliated with a larger union—instead, it was solely composed of Comau employees. In 2004, the PEA changed its name to the ASW, but otherwise maintained its leadership, bylaws and overall structure. (Tr. 140, 757, 862.)

In 2007, the ASW began exploring the possibility of affiliating with a larger union. After gauging the interest of various larger unions in such an affiliation, the ASW decided to affiliate with the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (the MRCC).[10] (Tr. 103; GC Exh. 34.) Proponents of the merger hoped that the affiliation with the MRCC would (among other things) enhance the ASW's bargaining strength, and also increase training and job opportunities for members of the bargaining unit. (Tr. 762–763, 1012, 1051, 1117; RU. Exh. 2; RE. Exh. 13 (pp. 590–592).) On the other hand, opponents of the merger expressed concerns about the substantial increase in union dues (an increase from $20 per month to the ASW, to $20 per month (to the ASW) plus an additional 2 percent of all wages (excluding vacation) per month to the MRCC), how the balance in the ASW treasury (approximately $250,000) would be handled, and the wisdom of associating with a union of carpenters given that the ASW bargaining unit was composed of machinists, and given that the MRCC already had several members laid off. (Tr. 723–724, 863–867, 974, 1013–1014, 1017–1018, 1111.)

The ASW bargaining unit voted to approve the merger with the MRCC, effective March 31, 2007. (Tr. 103, 867.) In connection with the merger, the ASW underwent the following changes: (a) executive board members Pete Reuter and Darrell Robertson terminated their employment with Comau and became full-time employees of the MRCC (they also continued to serve on the ASW/MRCC's executive board); and (b) the ASW became subject to the MRCC's bylaws. (Tr. 142, 764–765, 769–770, 1018–1019.)[11]

C. Contract Negotiations—2008–2009

In 2008, the ASW and Comau began negotiations for a new collective-bargaining agreement, since the existing agreement (effective from March 7, 2005, to March 2, 2008) was due to expire. (Tr. 809–810; GC Exh. 32.) The parties extended the collective-bargaining agreement through December 21, 2008, while negotiations proceeded. (Jt. Exh. 2.) The issue of health insurance coverage became a sticking point between the parties. *Comau*, 356 NLRB at 77. Under the previous collective-bargaining agreement, incumbent unit employees were not required to pay any premiums for the company-provided healthcare coverage. Although Comau used a self-insured health plan, the coverage was provided through Blue Cross/Blue Shield (Blue Cross). Under Comau's proposed contract, Comau would still be self-insured and coverage would still be provided through Blue Cross, but the unit employees would be required to pay health insurance premiums for coverage. Id.

The amounts of the proposed employee premiums were significant. Comau's last best offer provided that each employee's premium payment would be between $57.28 and $453.05 per month, depending on the level of benefits chosen, the type of coverage (individual, two-person, or family), and the extent of the cost increases during the term of the contract. The employees could also pay an additional $321.04 to $507.26 per month to obtain coverage for a child between 19 and 25 years of age. Comau's new plan also reduced the employees' coverage in some respects. Id.

At a December 3, 2008 bargaining session, Comau declared that the parties were at impasse, gave 14 days notice that it was canceling the contract extension, and stated that it would impose its last best offer on December 22 when the prior contract ceased to apply. During this same timeframe, Comau sent a letter to bargaining unit employees to describe the key changes that would be imposed on December 22. In addition to notifying the unit about new rules regarding tardiness, seniority, overtime pay and other issues, Comau also notified employees that, effective March 1, 2009, it would no longer offer the existing health insurance plans, but would instead offer healthcare coverage though other, employee-paid premium-required, medical plans. *Comau*, supra at 4; (see also Jt. Exhs. 1, 2).

Notwithstanding Comau's declaration of impasse, Comau and the ASW continued to negotiate about health insurance. Specifically, from December 8, 2008, through March 20, 2009, the parties (using healthcare insurance subcommittees) met on approximately 10 occasions for negotiations regarding healthcare insurance. Each party's subcommittee had the authority to enter into tentative agreements regarding employee health insurance, subject to final approval by the union membership (as to the ASW) and by Comau's full negotiating committee and/or upper management. *Comau*, supra at 5. Among other proposals, the subcommittees discussed the ASW/MRCC's suggestion that Comau stop paying to finance its own self-insured health insurance plan and instead make contributions to help cover the cost of insuring unit employees under a health insurance plan provided through the MRCC.[12] Id. In particular, the parties discussed the amount that Comau would pay to the MRCC plan for the employees' health insurance on a weighted average per-employee basis. Id. Comau initially offered (on December 8, 2008) to pay a weighted average of $766 per employee/per month, and on December 18, 2008, increased its contribution offer to $820 per employee/per month. Id.

Any prior impasse regarding healthcare ceased to exist on January 7, 2009, when Comau made a written proposal that significantly increased the per-employee contribution that Comau was offering to make to provide coverage under the

recognized the CEA as the unit's collective-bargaining representative. GC Exh. 1(bb) at 2.

[10] The MRCC is also referred to as the Millwrights. Tr. 355–356. The terms were used interchangeably during the trial.

[11] The ASW/MRCC still maintained its old bylaws, but to the extent that those conflicted with the bylaws of the MRCC, the MRCC bylaws controlled.

[12] The anticipated benefit of this proposed arrangement would be that unit employees would be spared the cost of paying for health insurance premiums, while Comau would realize a savings in cost since its contributions to the MRCC healthcare plan would be lower that the amount that Comau was paying to maintain its self-insured healthcare plan.

MRCC health insurance plan. *Comau*, supra at 9. Not only did Comau increase its contribution offer on January 7, 2009 (the weighted average is not known)—it again increased its contribution offer (in response to an ASW counteroffer) on February 5, 2009 (to a weighted average of $835 per employee per month).[13] Id. at 5 fn. 13. Meanwhile, Comau continued to prepare for implementing its new health insurance plan (as outlined in the imposed last best offer) in January 2009, as it met with unit employees to discuss the plan and complete the paperwork needed to enroll employees in the plan. Id. at 4; (Tr. 937, 941).

D. Early 2009—Employees Circulate a Decertification Petition and Comau Unilaterally Implements Its New Health Insurance Plan

In the weeks after Comau announced that it would be imposing its last best offer, employees began to voice their unhappiness with the ASW/MRCC. The prospect of paying significant health insurance premiums was a prominent concern, since the new premiums would be yet another deduction from employee paychecks. (Tr. 186–187, 399–400, 772, 817, 833–834, 1151–1152; RE. Exh. 13, pp. 542, 554–555, 561–562, 568, 576–577, 586, 595.) However, other latent discontent with the ASW/MRCC also rose to the surface, as various employees believed (in different degrees) that the ASW/MRCC: was not effective in attempting to negotiate a new contract (Tr. 186–187, 1117–1118); charged unduly high dues that came with little or no resulting benefit to the bargaining unit (Tr. 400, 740, 773, 1110, 1157; RE. Exh. 13, pp. 554–555, 571, 578, 613); failed to deliver on its promises to provide bargaining unit members with training and job placements (Tr. 825, 1050, 1110–1112, 1133, 1153, 1195–1196; RE. Exh. 13, pp. 592–593, 604, 610–612); did not protect bargaining unit members from losing job openings at Comau to contractors or members of other unions (Tr. 776–778, 1203–1204; RE Exh. 13, pp. 529–530, 610–611); and improperly claimed the entire balance of the ASW dues account (approximately $250,000) at the time of the March 2007 merger (Tr. 741–742, 1111).

In January 2009, the ASW/MRCC executive committee (minus Darrell Robertson and Pete Reuter) met to discuss how to respond to the concerns expressed by various members of the bargaining unit about the ASW/MRCC. (Tr. 375, 774, 778–779.) After some discussion, the executive committee researched the process for decertifying the ASW/MRCC (including consulting with an NLRB employee and obtaining materials from the NLRB website), and committee members Dave Baloga and Dan Malloy prepared a decertification petition. (Tr. 376–377, 780–781, 1021–1022.)

On February 18, 2009, employee Frederick Lutz signed a written request that the ASW executive committee initiate decertification proceedings from our ASW 1123/UBC/MRCC representation. (RU. Exh. 1; Tr. 726–727.) Based on that request, the executive committee members began gathering employee signatures (including their own) on the decertification petition, and also on individual forms authorizing the CEA to serve as the bargaining unit's collective-bargaining representative. (Tr. 782, 787, 1023; RU. Exhs. 3, 8.) However, later in February 2009, the executive committee transferred the responsibility of circulating the petition to employee Willie Rushing, after being warned (by Pete Reuter) that any executive committee member who circulated the petition could (among other things) be sued or disciplined by the ASW/MRCC. (Tr. 787–788, 790–791, 879–880, 940–941.) Once Rushing received the petition and the accompanying authorization for representation forms, he turned the materials over to unit employees who passed the materials around in Comau's facilities to obtain additional signatures.[14] (Tr. 880–881, 886.) Bargaining unit employees who signed the decertification petition in February 2009 were aware that the new health insurance plan and premiums would take effect on March 1, 2009. (RE. Exh. 13, pp. 554–555, 557–558, 560, 574, 585.)

On March 1, 2009, Comau unilaterally implemented the new health insurance plan contained in its imposed last best offer. *Comau*, supra at 9. As the Board has found, Comau's unilateral action was an unfair labor practice because the ASW/MRCC had not agreed to the health insurance plan, and because the previously declared impasse (declared by Comau in December 2008) was subsequently broken by (at the latest) January 2009 when Comau and the ASW/MRCC resumed negotiations about employee health insurance. Id.

In the 9 days that followed Comau's unlawful unilateral action, 34[15] additional employees signed and dated the decertification petition. (RU. Exh. 3.) In addition, employee discontent with the ASW/MRCC intensified.[16] As Daniel Malloy testi-

[13] Negotiations continued from this point until March 20, 2009. The ASW essentially agreed to the $835 per employee/per month contribution amount that Comau offered, but other issues remained unresolved. *Comau*, supra at 5–6, 9.

[14] While the petition circulated, ASW/MRCC executive committee members who signed the petition subsequently redacted their names and signatures from the petition, citing ongoing concerns that the ASW would take action against them for participating in the decertification effort. Tr. 886–887, 1048, 1173, 1181.

[15] The decertification petition in the record has been redacted to eliminate the names and addresses of the employees who signed the document (thus leaving only the date of signature). Tr. 886–887. To the extent that ASW/MRCC executive committee members signed the petition, those signature lines were fully redacted (by members of the ASW/MRCC) to obscure the entries in full, including the date of signature. The count (34) of signatures entered on or after March 1, 2009, referenced herein does not include any of the fully redacted entries (whether made by the executive committee or otherwise) on the petition. The petition as a whole contains 105 signatures (again, excluding the 13 fully redacted entries), most of which were entered on February 19, 2009. RU. Exh. 3. I note that although I am not including the 13 redacted petition entries in my calculations (since the redactions rendered the entries null and void), my analysis would remain the same even if the 13 redacted entries were counted.

[16] The Acting General Counsel presented the cover sheets of ASW/MRCC meeting minutes to demonstrate the change in ASW/MRCC meeting attendance in this time period (and to suggest that the decline in attendance was caused by the March 1 unfair labor practice). The cover sheets reflect the following attendance figures: January 7, 2009 (62 members attended); January 22, 2009 (69 members); February 4, 2009 (45 members); February 24, 2009 (50 members); March 4, 2009 (35 members); April 1, 2009 (29 members); May 6, 2009 (26 members); June 3, 2009 (32 members); July 1, 2009 (32 members); August 5, 2009 (29 members); September 2, 2009 (28

fied, while members of the bargaining unit were upset in December 2008 when Comau imposed its last best offer, once the health care premium money came out of the checks in March 2009, the bargaining unit employees "wanted to fry us. They wanted to fry the committee, they wanted to fry Pete [Reuter] and Darrell [Robertson]. . . . because we were promised all along that . . . they would work to keep us from having to pay anything." (Tr. 833.)

Rushing returned the completed decertification petition and authorization for representation forms to Dan Malloy. (Tr. 887.) Initially, Malloy (with the agreement of others) decided to delay filing the petition in hopes that the ASW/MRCC would deliver on some new promises (by Reuter) to place employees who had been laid off from Comau in other jobs. (Tr. 793–794, 888, 1025; RE. Exh. 13, pp. 602–603.) When those job placements did not materialize, Rushing retrieved the petition from Malloy and filed the decertification petition with the NLRB on or about April 14, 2009. (Tr. 888.)[17]

E. Employee Discontent Persists as Employees Await Action on Decertification Petition

In May 2009, Rushing met with MRCC director Doug Buckler to discuss the rationale for the decertification petition. Consistent with the concerns expressed by other employees, Rushing told Buckler (and also Reuter) that he was unhappy with: the MRCC's failure to provide training in skilled trades that it promised; the fact that the MRCC issued him a journeyman card that was limited to the ASW, and thus had little to no value in making him eligible for other jobs; the high cost of MRCC union dues; the transfer of the ASW dues account balance to the MRCC; and the quality of the MRCC health insurance that the ASW/MRCC proposed in negotiations (belatedly, in Rushing's view) as an alternative to Comau's health insurance plan. (Tr. 914–921.) Rushing also continued to monitor the status of the decertification petition periodically at the NLRB because he was getting pressure from bargaining unit employees, particularly when employees received another paycheck with ASW/MRCC union dues deducted. (Tr. 891.)

F. December 2009 Disaffection Petition

On November 19, 2009, Comau, the ASW and Rushing participated in a *Saint Gobain* hearing before Judge Bogas in Case 7–RD–3644 regarding decertification petition and pending charges. (See RE. Exh. 13); see also *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004). The decertification petition ultimately stalled.

In late 2009, Rushing obtained the contact information for a consulting firm to seek assistance with the pending decertification petition. (Tr. 894–895, 1026.) Rushing passed the consultant's information on to Harry Yale.[18] (Tr. 895.) With the consultant's assistance, Yale prepared a disaffection petition (a/k/a "Dana" petition), as well as a revocation of dues-checkoff authorization form. (Tr. 1027; RU. Exhs. 6, 7.) Each page of the disaffection petition contained the following language at the top of the page:

> We, the employees of Comau, Inc. in the bargaining unit of the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters) declare by our signatures below that we no longer want to be represented by that Union, and we request that Comau, Inc. immediately stop recognizing that Union as our collective bargaining representative.
>
> We no longer want to be represented by the Automated Systems Workers Local 1123 (a Division of the Michigan Regional Council of Carpenters) because of the excessive dues that Union charges us each month and because it has not come through on its promises to increase job opportunities for us—and not because Comau, Inc. in the last year or so unilaterally implemented new terms of employment for us including the Company health care plan.
>
> We also declare by our signatures below that we want to be represented by the Comau Employees' Association, and we request that Comau, Inc. immediately begin recognizing the Comau Employees' Association as our collective bargaining representative.

(RU. Exh. 6.)

On December 15, 2009, Yale placed copies of both the disaffection petition and revocation of dues-checkoff forms in binders, and placed the materials on his desk at Comau for employees to review and sign on their break time.[19] (Tr. 897–898, 1029–1030.) On his own time, Yale also took the binders to other Comau facilities in the area for members of the bargaining unit to review and sign the petition and dues-checkoff revocation form. Id. At each facility, employees generally passed the materials around for review, but occasionally did so during work time. (Tr. 1065–1066, 1112, 1124, 1140.) The petition generally was circulated without much discussion, other than describing the petition as a document about getting out of the

members); and November 3, 2009 (12 members). See GC Exhs. 9–13, 15–21. I have given limited weight to these meeting attendance figures because while the numbers do show a downward trend in 2009, the record does not include attendance figures from 2008. Without the comparison data from 2008, I cannot rely on the meeting attendance figures to conclude with any confidence that attendance declined because of (among other possibilities) Comau's unfair labor practice on March 1, routine fluctuations that occur every year, or because of a spike in attendance (and then a return to normal levels) after Comau imposed its last best offer in December 2008.

[17] The parties have stipulated that on December 22, 2009, there were 178 employees in the bargaining unit. There was no stipulation proposed or offered about the unit's membership on April 14, 2009. However, the evidence in the record indicates that the bargaining unit included between 234 and 237 employees as of April 14, 2009. RE. Exh. 13, pp. 527, 600.

[18] Yale served as an ASW/MRCC executive committee member until July 2009, when he lost his bid for reelection to the committee.

[19] In this same time period, several employees objected to the fact that MRCC dues were deducted from their annual holiday check. By tradition, Comau closes its facilities for a period of time in December, and issues its employees a holiday check for a predetermined number of hours as a bonus payment. Tr. 898. Although MRCC dues were deducted from holiday checks in 2007 and 2008, several employees objected when MRCC dues were deducted from holiday checks in 2009, and expressed frustration that the April 2009 decertification petition remained unresolved. Tr. 899, 903, 1217–1219; GC Exh. 55.

Union. (Tr. 158, 1124, 1153–1154.) Some employees testified that they did read the language at the top of the disaffection petition before they signed the document. (Tr. 1116, 1133–1134, 1142, 1202–1203.)

Employee Rich Mroz, however, had a somewhat different experience with the disaffection petition. As Mroz explained, initially one of his leaders (Nelson Burbo) at the Novi facility approached him and advised him about the disaffection petition that was circulating. Burbo then asked Mroz if he was happy with the ASW/MRCC, to which Mroz responded that although he was not happy with the Union, he thought it might be a bad time to get out of the Union in light of the ongoing dispute with Comau about health insurance benefits. (Tr. 158–159.) On another day, another leader (James Reno) invited Mroz (who was on his worktime) to speak to Yale, who was visiting the facility. Mroz agreed to speak with Yale, and reiterated his concern that it might be a bad time for the disaffection petition. Yale did not disagree with that opinion, but asserted that the MRCC was not going to get anywhere with its efforts to recover the money that members of the bargaining unit spent to pay the new health insurance premiums. (Tr. 160–161.) Mroz also asked if his leaders signed the petition,[20] to which Yale replied that Mroz' leaders did sign the petition, as did a majority of employees in the unit. (Tr. 162.) Mroz agreed to sign the petition after confirming that his brother also signed the document, but noted that the information he received from Yale did influence his decision to sign. (Tr. 162–163, 192.)

On or about December 21, 2009, Yale received the completed disaffection petition and revocation of dues-checkoff authorization forms.[21] (See RU. Exh. 6 (final signatures dated December 21, 2009).) Yale notified Comau human resources director Fred Begle on December 21 or 22 that he planned to give him the documents, and actually delivered the materials to Begle on December 22, 2009. (Tr. 1076, 1085, 1088; RE. Exh. 1 at 12.) Begle accepted the petition, and advised Yale that he (Begle) would verify the signatures on the petition.[22] (Tr. 1032, 1085, 1088.) Begle then compared the signatures on the disaffection petition with sample signatures obtained from individual employee files, and determined that 103 members of the bargaining unit (out of a total of 178 employees in the unit) signed the disaffection petition. (Tr. 964–965, 1076–1078; RE. Exh. 1 at 27.)

On December 22, 2009, after verifying the signatures on the disaffection petition, Comau notified the bargaining unit that a majority of employees in the unit requested that Comau withdraw recognition from the ASW/MRCC Union and instead recognize the Comau Employees' Association (CEA) as the unit's exclusive collective-bargaining representative. (Jt. Exh. 4; see also Jt. Exh. 5.) Accordingly, effective December 22, 2009, Comau withdrew recognition from the ASW/MRCC, stopped withholding ASW/MRCC dues from the paychecks of unit employees, and immediately recognized the CEA as the unit's exclusive collective-bargaining representative. Id.

G. The CEA Becomes the Unit's Collective-Bargaining Representative

In February 2010, the CEA elected the following individuals as its officers: Yale (president); Rushing (secretary); Jeffrey H. Brown (vice president); Fred Lutz (treasurer); Jim Morabito (committeeman); Chris Economides (committeeman); and Jim Kayko (committeeman). (Tr. 729; 907–908; 981; 1038; 1174–1075.) The CEA and Comau subsequently negotiated a new collective-bargaining agreement that was then ratified by the CEA membership in April 2010. (Tr. 217–218, 907–908, 1040; Jt. Exh. 3 (noting that the contract was effective from December 22, 2009 through April 13, 2013).) The collective-bargaining agreement included the following union-security clause:

> a) Seniority employees shall be required, as a condition of continued employment, to become dues paying members of the [CEA]. Dues will be collected by the Company the last week of each month by payroll deduction. Any uncollected dues for the current month will be reported to the CEA by the Company. The CEA will then specify which of those uncollected dues must be collected from the November vacation pay check each year or as soon as administratively possible. The Company will remit payment of collected dues to the CEA by wire transfer, to the CEA bank account, within seven (7) days or as soon as possible as it becomes administratively possible.
>
> b) In addition to the above, non-seniority employees with more than thirty (30) days service shall be required, as a condition of continued employment, to become dues paying members of the association.

(Jt. Exh. 3 at 1–2.)[23]

[20] Mroz expressed concern about going against the opinion of his leaders about the petition, and thus running the risk of the leaders taking an adverse action against him as a result. Tr. 162–163, 165.

[21] Other than the acts of its alleged agents (Yale, Burbo and Reno) as described herein, there was limited evidence that Comau facilitated or participated in the circulation of the disaffection petition. Baloga testified that he saw two employees on layoff status approach the binder with the petition, but the record does not show that Comau gave those individuals access to the shop floor (as opposed to an employee using his or her own scan card to allow access, or a Comau clerical employee allowing access without management's knowledge). Tr. 286–288, 628–629, 949. Similarly, while Baloga testified that Comau generally enforced rules for when materials can be circulated on the shop floor, there is no evidence that Comau officials knew the disaffection petition was being circulated before December 21, 2009, and decided not to enforce the rules for circulating such materials. Tr. 284–285, 353. I have considered an excerpt from Comau's position paper (read by the Acting General Counsel into the record as an admission by a party opponent) on the latter issue, and do not find a basis to conclude that Comau was aware that the disaffection petition was being circulated before the petition was nearly (if not fully) completed. See RU. Exh. 6 (indicating that most employees signed the petition on or before December 18, 2009, shortly after the document began circulating).

[22] Begle asked Yale to keep the revocation of dues-checkoff authorization forms while the signatures on the petition were being authenticated. Yale delivered the revocation of dues-checkoff forms to Begle on January 11, 2010. Tr. 1032–1033.

[23] The 2005–2008 collective-bargaining agreement between the ASW and Comau contained a similar provision. GC Exh. 32 at 2.

H. The CEA Asks Employees to Sign Dues-Checkoff Authorization Forms

In May 2010, CEA committeemen distributed union dues-checkoff authorization forms for employees to sign to authorize Comau to collect dues by automatic payroll deduction. (Tr. 982–983; RE. Exhs. 6, 9(a).) Several employees signed the form without objection. (Tr. 983.) However, some employees (at least initially) declined to sign the form.[24] One such employee was Nizar (Bill) Akkari, a machinist who was working at the Novi facility. (Tr. 215–216.) In May 2010, Akkari was approached on two occasions by Jim Kayko, who asked Akkari if he was willing to sign the dues-checkoff authorization form. Akkari refused on both occasions. (Tr. 220–221, 986–987.) After the second refusal, Kayko advised Akkari that he would probably need to speak to Fred Begle about the issue. (Tr. 221, 988.) During Akkari's next shift at work, the night-shift supervisor (Matthew Parsons) notified Akkari that Begle was at the Novi facility and wished to speak with him. (Tr. 222.) Akkari accordingly met with Begle (and Parsons) in an available office, and Begle advised him that he would be terminated if he did not sign the dues-checkoff authorization form.[25] Begle did not offer Akkari any option to pay union dues by any other means besides automatic payroll deduction. (Tr. 223–224, 227.) Akkari relented and signed the dues-checkoff authorization form.[26] (Tr. 218–219; GC Exh. 37.)

Employee Gasper Calandrino reported a similar experience at the Jefferson North Assembly Plant, one of Comau's field service locations.[27] (Tr. 410.) In May 2010, Site Supervisor Duane Jerore advised Calandrino that he should review a dues-checkoff authorization form, sign it, and return the form to him. Calandrino complied with Jerore's request, but since he did not want dues deducted from his paycheck (preferring instead to pay dues in person and receive a receipt), Calandrino wrote on the form, "I do not authorize the company to payroll deduct." (Tr. 413.) Jerore agreed to turn the annotated form in to Fred Begle,[28] but advised Calandrino that "[y]ou could be disciplined or up to a discharge on something like that," and added that "chances are we'll probably get a phone call from Fred." (Tr. 414.)

The next day at work, Calandrino received a message that he needed to see Jerore in the office. Jerore told Calandrino that before he began his shift, they needed to call Begle about the dues-checkoff authorization form. (Tr. 415.) In the ensuing telephone conversation with Begle, Calandrino confirmed that he did not wish to authorize payroll deduction for dues, again noting his preference for having a receipt for individual payments. Begle responded by stating that payroll deduction is more convenient, and then asked Calandrino if he was aware of the consequences, which included being disciplined or terminated if his dues were late or went into arrears. Begle added that Calandrino had been a good employee and had been at Comau for a long time, and stated that he would hate to see disciplinary action or discharge happen if Calandrino did not keep up with his dues payments. (Tr. 416–417.) Feeling pressured, Calandrino signed a new dues-checkoff authorization form.[29] (Tr. 417; GC Exh. 35.)

Jeffrey T. Brown testified about his experience with the dues-checkoff authorization form at Comau's Southfield complex (specifically, at the Arlens facility, one of the three buildings at the complex). (Tr. 490, 495–500.) CEA Treasurer Fred Lutz first approached Jeffrey T. Brown about signing a dues authorization form in February 2010, prompting Brown to advise Lutz that he did not want to, and would not, sign the form. (Tr. 496.) Lutz told Brown that he was going to provide Begle

[24] In connection with this issue, the Acting General Counsel presented a chain of emails provided by ASW/MRCC President Darrell Robertson. See GC Exh. 6. Part of that exhibit includes an email sent on May 14, 2010, by Comau administrative assistant Jill Opasik to various Comau personnel (including Fred Begle, Duane Jerore, and James Kayko). Opasik's email listed employees who had not signed a dues-checkoff authorization form, and stated that the employees could be terminated if they did not sign the form by May 18, 2010. Id. at 2. Another portion of the email chain suggests that Jerore forwarded Opasik's email to five employees (Al Redd, Ronald Krieger, Gary Hilliker, James Wheeler, and Robert Fox). Id. at 1. However, in the text of Jerore's message, he referred the employees to a notice that was apparently attached to his e-mail, but was not entered into the trial record. Id.

I have given little weight to GC Exh. 6 for the following reasons: (a) no testimony was offered about Opasik's role with Comau or her authority to speak for Comau as an agent, and thus the content of her email is hearsay; and (b) the Acting General Counsel did not call any of the five employees who purportedly received Jerore's forwarded message to testify as witnesses during the trial, and thus the record contains no information (beyond the uncorroborated exhibit itself) about what information these employees ultimately received from Jerore.

[25] I have credited Akkari's account of this conversation. Begle was present in the courtroom during Akkari's testimony (as one of Comau's designated assistants), and did not dispute Akkari's account when he later testified as one of Comau's witnesses. Tr. 1084. I have considered the fact that Comau impeached Akkari's testimony on a narrow point, insofar as Akkari incorrectly asserted that he never before was required to sign a dues-checkoff authorization form (compare Tr. 231 *with* RE. Exhs. 19–20), but that limited impeachment did not undermine the credibility of Akkari's overall testimony, which was corroborated by other witnesses and was not contradicted by Begle.

[26] Dave Baloga also testified that Kayko approached him about signing a dues-checkoff authorization form. According to Baloga, he reluctantly signed the form after being told that the contract prevented him from simply paying dues in cash at union meetings. Tr. 290; GC Exh. 38. Kayko, meanwhile, testified that Baloga simply signed the form when asked to do so, saying, I might as well. Tr. 989; see also Tr. 447 (Christopher Bloodworth testimony that in February 2010, Jeffrey H. Brown approached both him and Baloga about the dues-checkoff authorization form. Both Bloodworth and Baloga refused to sign the form at that time); Tr. 982–983 (describing Kayko's efforts to ensure that he asked employees about the dues-checkoff authorization form "in the right way"). The limited testimony offered about Baloga's exchange with Kayko was equally credible and plausible, and thus I have afforded the testimony equal weight.

[27] Periodically, Comau assigns employees to off-site locations to work on projects. The assignments are field service assignments. Tr. 411.

[28] It is not clear what happened to the form that Calandrino annotated. No annotated form was presented at trial or entered into the trial record.

[29] Calandrino's testimony was uncontradicted, even though Begle was present in the courtroom for his testimony and later testified for Comau. Tr. 1084.

with a list of all employees who did not sign the dues-checkoff authorization form, and Brown responded that if Begle gave him a letter that his job was at risk if he did not sign, then Brown would sign the form. Id.

Lutz again approached Jeffrey T. Brown about the dues-checkoff authorization form in May 2010. Brown accepted the form, but did not sign it. (Tr. 496, 734.) Lutz checked back with Brown twice more about the form, and on the second visit, Brown asked about the possibility of paying dues in cash. Lutz responded that he (Lutz) would have to speak with Begle about that, and a few minutes later, returned to Brown and advised him that they both needed to speak with Begle in Begle's office (located in the Comau Center, another building at the Southfield complex). (Tr. 497–498, 735.) At the meeting with Begle, Begle asked Brown why he did not wish to sign the dues-checkoff authorization form, and Brown explained that he preferred to pay in cash since the Company was into his paycheck more than enough already. (Tr. 498–499.) Begle initially expressed some reservations about having CEA officials collect $20 in cash every month from various employees, but liked Brown's proposal that he pay a full year of dues in cash ($240). Lutz, however, asked Brown what would happen if he was laid off in 6 months. Unsure of the intent behind Lutz' question, Brown did not respond. (Tr. 499.) After some additional chitchat, Brown decided he was done with the conversation and handed over a signed dues-checkoff authorization form.[30] (Tr. 499; GC Exh. 36.)

I. Comau and the CEA Attempt to Clarify Their Positions About Dues-Checkoff and Other Methods of Paying CEA Dues

On June 9, 2010, Comau (through Begle) posted a notice to the bargaining unit about the dues-checkoff authorization forms. The notice stated:

> The ASW has charged that our employees have been coerced into signing dues authorization forms. We have investigated this allegation and do not believe it to be factually accurate. Just to be sure that everyone understands their rights, however, we want to confirm the following:
>
> While the contract contains a requirement that employees become dues paying members, the contract does not require that dues be paid through a payroll deduction authorization, with dues to be withheld by the Company from your paycheck. It is up to you whether you wish to authorize payment of your dues in that manner.
>
> In the event anyone signed a dues deduction authorization form under the mistaken assumption that the Company required this, you should feel free to rescind the authorization and deal with the CEA directly. In that event, please so indicate to me in writing.

(RE. Exh. 9(b).) Two employees subsequently rescinded their dues-checkoff authorization forms based on Comau's notice, and received refunds from Comau for any dues that were paid by undesired payroll deductions. (Tr. 1083–1084.)

Akkari admitted that he saw Comau's notice about the dues-checkoff authorization forms after it was posted, and he admitted that he did not request that Comau rescind the authorization form that he signed. (Tr. 229; see also Tr. 501 (Jeffrey T. Brown also saw the letter).) Akkari explained, however, that he did not take Comau up on its June 9, 2010 offer because he felt like Comau was playing games, and because he saw the CEA's letter of understanding posted on the Novi shop floor stating that the only acceptable method for paying dues (other than payroll deduction) was by certified cashier's check. (GC Exh. 2; Tr. 230, 242–244; see also Tr. 502 (Jeffrey T. Brown saw the CEA's letter of understanding posted at the Arlens facility).) CEA's letter of understanding stated:

> Subject: union dues by means other than direct deposit.
>
> 1.) Certified cashiers check, is the only acceptable method of payment. Made out to the Comau Employees Association.
>
> 2.) Payment must be received by the end of the 3rd week of every month (Friday is considered the last day of the work week).
>
> 3.) Payment must be hand delivered to the union president, vice-president or treasurer. (Mailing is not acceptable)
>
> President: Harry Yale
> Vice-President: Jeff H. Brown
> Treasurer: Fred Lutz
>
> 4.) Late payments will not be accepted as a general practice, and disciplinary action will be instituted, up to and including discharge. As per the union by-laws governing dues payments, and as stated in our labor agreement (Section # 3.2).
>
> 5.) If there is an acceptable reason for a late payment (field service, etc.) the $10.00 late fee will still be applied.
>
> 6.) If these terms are not acceptable, then direct deposit is the only other means of payment.

(GC Exh. 2.) Before the letter of understanding was posted, Yale sent it to Begle for review. (GC Exh. 53 (email sent on May 21, 2010).)

On June 18, 2010, Harry Yale sent an email to Jim Kayko (and cc'ed to Fred Begle) to instruct Kayko to deliver a copy of the letter of understanding to an employee (Ken Skrbalo) who rescinded his dues-checkoff authorization. (GC Exh. 54.) Per Yale's email, if Skrbalo did not pay his dues by the following

[30] I have credited Brown's version of the conversation. Begle testified at trial, but did not challenge Brown's account of their conversation. Tr. 1084. Lutz also testified, but stated on direct that he did not remember the whole conversation with Begle. Tr. 737. However, Lutz answered, yes when asked to affirm the accuracy of closed/leading questions about the conversation with Begle during cross examination. Tr. 748. Lutz' demeanor and answers were tentative and uncertain, and generally indicated that Lutz was having trouble remembering the details of the interactions that he had with Brown and other employees in the relevant time period. Finally, Brown's credibility was bolstered by the corroborating testimony that employee Chris Bloodworth offered about his own interaction with Lutz. According to Bloodworth, Lutz approached him at the Arlens facility and stated that Begle wanted Lutz to bring Bloodworth over to talk about the dues-checkoff authorization form. Not wanting to cause any problems with his job status, Bloodworth agreed to sign the form. Tr. 449. Lutz was not questioned about his interaction with Bloodworth.

Friday, "we will start the proceedings as stated in the contract and by-laws." Id. Notwithstanding the terms stated in the letter of understanding, Yale ultimately permitted Skrbalo to pay his dues for the year by personal check.[31] (Tr. 1059–1060.)

J. The Board Rules that Comau Committed an Unfair Labor Practice by Unilaterally Implementing its Healthcare Plan on March 1, 2009

On November 5, 2010, the Board affirmed Judge Bogas' rulings, findings and conclusions in Case 07–CA–052106. *Comau*, 356 NLRB 75 (2010). In particular, the Board adopted Judge Bogas' finding that Comau violated Section 8(a)(5) and (1) by unilaterally implementing a new health insurance plan in the absence of an agreement or a bona fide impasse with the ASW/MRCC. Id. at 1 fn. 5.

Discussion and Analysis

A. Comau's Decision to Withdraw Recognition from the ASW and Recognize the CEA

1. Complaint allegations and asserted legal theories

The principal issues in this case turn on whether Comau ran afoul of the Act when (on December 22, 2009) it withdrew recognition of the ASW/MRCC as the bargaining unit's exclusive collective-bargaining representative, and recognized the CEA as the unit's new representative.

The complaint specifically alleges that Comau: failed to bargain collectively and in good faith with the ASW when it withdrew recognition from the ASW (in violation of Sec. 8(a)(5) and (1)); dominated, interfered with and rendered unlawful assistance to the CEA when, in the absence of the support of an uncoerced majority of employees, Comau recognized the CEA as the unit's exclusive bargaining representative, entered into a collective-bargaining agreement with the CEA that contained a union-security clause, and deducted CEA union dues from employee wages pursuant to the union-security clause (in violation of Sec. 8(a)(2) and (1)); and discriminated against employees regarding hiring and the terms and conditions of employment (and unlawfully encouraged membership in the CEA) by entering into a collective-bargaining agreement with the CEA that contained a union-security clause (in violation of Sec. 8(a)(3) and (1)). (GC Exh. 1(v), pars. 24–26.)

As for the CEA, the complaint alleges that at a time when the CEA did not represent an uncoerced majority of employees in the unit, the CEA: unlawfully obtained recognition from Comau as the unit's exclusive collective-bargaining representative (in violation of Sec. 8(b)(1)(A)); and attempted to cause Comau to discriminate against its employees via the CEA collective-bargaining agreement and union-security clause (in violation of Sec. 8(b)(2) of the Act. (GC Exh. 1(v), pars. 28–29.)

At trial, the Acting General Counsel offered two legal theories to support the allegations in the complaint regarding Comau's decision to withdraw recognition from the ASW/MRCC. First, the Acting General Counsel asserted that the December 2009 disaffection petition that Comau used to conclude that the ASW did not represent a majority of employees in the unit was tainted by Comau's prior unfair labor practices (specifically, Comau's March 1, 2009 implementation of its new health insurance plan). Second (and in the alternative), the Acting General Counsel asserted that the disaffection petition was tainted because certain individuals (Harry Yale, James Reno, and Nelson Burbo) who circulated it did so with the apparent authority of Comau. As described below, I find that the Acting General Counsel has demonstrated by a preponderance of the evidence that the disaffection petition was tainted by a prior unfair labor practice.[32]

2. The December 2009 disaffection petition was tainted by Comau's March 1, 2009 unfair labor practice

A union is irrebuttably presumed to continue to enjoy the support of a majority of the unit employees while a collective-bargaining agreement is in effect. *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 176 (1996). After the contract expires, the union still is presumed to enjoy majority status, but the presumption is rebuttable. In such a situation, an employer may rebut the presumption and withdraw recognition if it can show that the union in fact no longer has the support of a majority of the unit employees. Id. at 176–177; *Champion Home Builders Co.*, 350 NLRB 788, 791 (2007); see also *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 725 (2001) (overruling precedent that also allowed an employer to withdraw recognition from a union based on a good-faith doubt about the union's continued majority status).[33]

However, an employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship. *Champion Home Builders*, 350 NLRB at 791. Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of

[31] Yale asserted that the CEA never enforced the terms of its letter of understanding. Tr. 1059–1060. There is no evidence, however, that the CEA advised the bargaining unit as a whole of any decision not to enforce the letter of understanding.

[32] Because I have found that the disaffection petition was tainted by the unfair labor practice that Comau committed on March 1, 2009, I need not rule on the Acting General Counsel's alternative theory that the petition was tainted because it was circulated by employees who were Comau's agents. However, I note that I have made findings of fact (including credibility findings) that are relevant to that theory, should further analysis be necessary.

[33] While Comau has argued that it was legally obligated to withdraw recognition from the ASW/MRCC when it received the December 2009 disaffection petition, the Board has clearly stated that an employer with objective evidence (such as a disaffection petition) that a union has lost majority support withdraws recognition at its peril. *Levitz Furniture Co. of the Pacific*, 333 NLRB at 725 (noting that an employer in that circumstance runs the risk of being found to have violated Sec. 8(a)(5) if it is later shown that the union had not lost majority support). The Board also explained that as an alternative to simply withdrawing recognition based on the objective evidence, an employer lawfully may file an RM petition for an election and continue to recognize the incumbent union while the election proceedings are ongoing. *Levitz*, supra at 724.

support. *Lee Lumber*, 322 NLRB at 177. In determining whether a causal relationship exists between unremedied unfair labor practices and the loss of union support, the Board considers the following factors: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Champion Home Builders*, 350 NLRB at 791 (citing *Master Slack Corp.*, 271 NLRB 78, 84 (1984)).[34]

In this case, a few preliminary facts are clearly established. The Board has determined that Comau committed an unfair labor practice on March 1, 2009, when it violated Section 8(a)(5) and (1) by changing employees' healthcare benefits without the ASW/MRCC's consent and in the absence of a bona fide impasse. *Comau*, 356 NLRB at 85. In addition, there is no dispute that the ASW/MRCC had actually lost majority support by December 22, 2009, as indicated by the fact that a majority of the employees in the bargaining unit (103 employees out of 178 in the unit at the time) signed a December 2009 disaffection petition stating that they no longer wished to be represented by the ASW/MRCC. (See RU Exh. 6.) Finally, it is undisputed that Comau recognized the CEA as the bargaining unit's exclusive collective-bargaining representative on December 22, 2009, and subsequently entered into and adhered to a collective-bargaining agreement with the CEA that included a union-security clause. See findings of fact (FOF), above, section II(G).

The question in dispute is whether there is a causal relationship between the March 1, 2009 unfair labor practice and the loss of majority support for the ASW/MRCC that was evident on December 22, 2009. To examine that issue, a review of the operative facts is warranted. Comau declared impasse in December 2008, and based on that impasse, imposed its last best offer (including the new health insurance plan, which would take effect on March 1, 2009) on December 22, 2008. See FOF, above, section II(C). The impasse regarding employee health insurance coverage was broken on January 7, 2009. Id. Comau, however, continued to prepare employees for the effective date of the health insurance plan set forth in Comau's imposed last best offer. Id. In February 2009, employees began circulating a petition to decertify the ASW/MRCC. See FOF, above, section II(D). While employees had a variety of reasons to be unhappy with the ASW/MRCC and therefore sign the petition,[35] the unilaterally imposed healthcare plan was prominent among those reasons. Of the 103 employees that ultimately signed the decertification petition, all did so on or after February 19, 2009 (i.e., within days of the March 1 effective date of the healthcare plan), and 34 did so on or after March 1, 2009. Id. Once the unilaterally imposed healthcare plan took effect, bargaining unit discontent with the ASW/MRCC reached a new high, and carried forward[36] to December 2009, when Harry Yale prepared and circulated the disaffection petition that Comau relied on when it withdrew recognition from the ASW/MRCC on December 22, 2009. FOF, above, sections II(E), (F).

Turning to the relevant factors, 9 months passed between the March 1, 2009 unfair labor practice in this case and Comau's December 22, 2009 decision to withdraw recognition from the ASW/MRCC. That length of time does not, per se, preclude a finding of a causal relationship. See, e.g., *AT Systems West*, 341 NLRB 57 (2004) (unfair labor practice was within 9 months of the withdrawal of recognition that it caused); *Columbia Portland Cement v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992) (same, but with a passage of 1 year). More important, the facts of this case show that the March 1, 2009 unfair labor practice had a more immediate effect on the bargaining unit, as the bargaining unit unhappiness with the new health insurance premiums drove (at least in part) the contemporaneous decertification petition that employees signed in February and March 2009, and filed in April 2009. Thus, the December 2009 disaffection petition was essentially an effort to renew the spring 2009 decertification movement that started just before the unilaterally imposed healthcare plan (unlawfully) took effect.

The evidentiary record and applicable case law also show that the nature of the unfair labor practice here included the possibility of a detrimental and lasting effect on employees, as well as a tendency to cause employee disaffection (factors 2 and 3). The fact that Comau imposed the new health care plan and its accompanying employee-paid premiums unilaterally is particularly significant. It is well established that when an employer makes unilateral changes to terms and conditions of

[34] The *Master Slack* test is an *objective* test aimed at evaluating whether a causal relationship exists between unremedied unfair labor practices and subsequent loss of union support. See *Saint Gobain Abrasives*, 342 NLRB at 434 fn. 2 (noting that it is not relevant to ask individual employees why they chose to reject the union); *AT Systems West*, 341 NLRB 57, 60 (2004) (subjective state of mind of the employees is not relevant). During trial, I permitted Comau and the CEA to present evidence about the objective circumstances that may have caused employee disaffection independent of the March 1, 2009 unfair labor practice. However, I did not permit the CEA to call (as it proposed) between 20 to 90 witnesses to testify about their subjective reasons for signing the December 2009 disaffection petition, because the witness' subjective reasons are not relevant to the inquiry, and the witnesses' expected testimony about the objective circumstances was cumulative.

[35] Those reasons include employee impressions that the ASW/MRCC: was not effective in attempting to negotiate a new contract; charged unduly high dues that came with little or no resulting benefit to the bargaining unit; failed to deliver on its promises to provide bargaining unit members with training and job placements; did not protect bargaining unit members from losing job openings at Comau to contractors or members of other unions; and improperly claimed the entire balance of the ASW dues account (approximately $250,000) at the time of the March 2007 merger.

[36] Employee discontent about the health insurance plan was kept alive by a variety of factors, including: the ongoing, significant deductions from employee paychecks to pay the premiums required for the unilaterally imposed health insurance plan; meetings with the ASW/MRCC about the decertification petition that touched on health insurance (among other issues); and the November 19, 2009 *St. Gobain* hearing in Case 7–RD–3644 in which several employees testified (and were reminded of the fact) that the new health insurance (and its cost) was among their concerns when they signed the decertification petition.

employment, those changes harm the union's status as the bargaining representative because the employer's actions undermine the union in the eyes of the employees and give the impression that the union is powerless. *Priority One Services*, 331 NLRB 1527, 1527 (2000) (collecting cases); see also *Goya Foods of Florida*, 347 NLRB 1118, 1120–1121, 1123 (2006) (unilateral changes to working conditions are likely to have an impact on union support); *Penn Tank Lines*, 336 NLRB 1066, 1067–1068 (2001) (unilateral changes to terms and conditions of employment minimize the influence of organized bargaining and show employees that their union is irrelevant, thereby creating a clear possibility of a detrimental or long lasting effect on employee support for the union). The Board also has recognized that unilateral increases in employee health insurance premiums can undercut the union's ability to function as the employees' bargaining representative, because the unilateral changes substantially affect all unit employees and directly impact employee compensation, one of the fundamental subjects of bargaining. *Priority One Services*, supra (discussing the effect of a 9.5-percent increase in health insurance premiums). The unilateral change to employee health care at issue in this case was even more significant than the change discussed in *Priority One Services*, because instead of a percentage increase to premiums that employees were already paying (as in *Priority One*), Comau's unilaterally changed employee health insurance premiums from zero (since Comau paid all costs under the 2005–2008 contract) to hundreds of dollars per month in some cases.

Finally, the record shows that Comau's unilateral change to its employee health insurance plan had an adverse effect on employee morale, and on the ASW/MRCC's organizational activities and membership. The new health care plan played a significant role in motivating employees to sign the spring 2009 decertification petition[37]—indeed, all employees signed within days (on either side) of the effective date of the new health insurance plan, and 34 employees signed after March 1, 2009.[38] In addition, as witness Daniel Malloy explained, members of the bargaining unit were upset when Comau imposed its last best offer (in December 2008), but when the health insurance premiums began coming out of employee paychecks in March 2009, employees wanted to fry the ASW/MRCC leadership because it failed to deliver on its promise to protect employees from having to pay the premiums.[39] Those sentiments persisted for the rest of 2009, as employees pursued the decertification petition with the Board (particularly after receiving yet another paycheck with unwanted deductions), questioned the ASW/MRCC's efforts to address the issue of employee healthcare at meetings, and ultimately renewed the effort to get rid of the ASW/MRCC by circulating the December 2009 disaffection petition.[40]

[37] As part of their defense, the Respondents maintain that employee disaffection with the ASW/MRCC preceded the March 1, 2009 unfair labor practice. The record does show that before March 1, 2009, there was some employee discontent with the ASW/MRCC about issues such as high union dues, the ASW/MRCC's failure to provide training and job placements, and the ASW/MRCC's failure to protect bargaining unit members from losing Comau job opportunities to workers that did not belong to the bargaining unit. Several of those sources of discontent, however, had been present since the ASW/MRCC merger in March 2007, but were tolerated to some degree with the hope that in the end, the merger would be beneficial. More important, even though there were other reasons for bargaining unit employees to be unhappy with the ASW/MRCC, the fact remains that Comau's unilateral imposition of the health insurance plan had a reasonable tendency to (and did, in fact) cause employee disaffection with the ASW/MRCC.

[38] The Respondents contend that the Acting General Counsel is limited to arguing events that occurred on or after March 1, 2009, the day that the health insurance plan took effect (and thus the date of the unfair labor practice). While it is true that March 1, 2009 unfair labor practice is the only one at issue, the facts about that unfair labor practice are not limited to March 1 and after, particularly on the issue of whether a causal relationship exists between the unfair labor practice and the loss of union support. Simply put, this is not a case where the unfair labor practice occurred on a specific date and took everyone by surprise. To the contrary, Comau announced the March 1, 2009 health insurance plan effective date in December 2008, and held meetings in January 2009 to prepare employees for the change. Thus, the new health insurance plan (which ultimately was found to be an unfair labor practice) was on the minds of employees at least by January 2009, after the impasse had been broken and before the decertification petition began circulating. To the extent that the Respondents suggest that they were not given an opportunity to litigate this issue (employee sentiment before March 1, 2009), I note that the record demonstrates that the contrary is true. The Respondents presented extensive testimony about factors that could have caused employee disaffection before March 1, 2009 (to support their defense that employee discontent preceded the unilateral change to the employee health insurance plan), and the parties offered exhibits (most without objection) relating to events that occurred before March 1, 2009. See, e.g., RE. Exh. 13 (transcript of the November 19, 2009 *St. Gobain* hearing regarding the decertification petition circulated in February and March 2009).

That being stated, the fact remains that even if the causation analysis were limited to events that occurred on or after March 1, 2009, there is ample evidence that links the March 1, 2009 unfair labor practice with the loss of support for the ASW/MRCC leading up to the December 2009 disaffection petition. See discussion accompanying this footnote, supra.

[39] The Respondents suggest that employee discontent about the health insurance plan did not arise until March 6, 2009, the actual date that the first premiums were deducted from their paychecks. See RE. Br. at 11. The purpose of that argument is to suggest that employees who signed the decertification petition between March 1 and March 5 (28 employees out of the 34 that signed the petition on or after March 1) were not aware of the March 1 unfair labor practice because the first health insurance premiums were not deducted from their paychecks until March 6. I do not find this argument to be persuasive. First, the Board has ruled that the unfair labor practice occurred on March 1, 2009, and that ruling is binding for purposes of my analysis. Second, as discussed above, the March 1, 2009 effective date of the health insurance plan was well publicized, and naturally was on the minds of employees for some time. Once March 1 arrived, the health insurance plan took effect, and there was no question that health insurance premiums would be deducted from employee paychecks. Just as a reasonable employee would be aware of a forthcoming reduction in wages, I find that a reasonable employee would have been aware of the forthcoming new healthcare premiums both when the decertification petition was circulated in late February 2009, and when the new health insurance plan took effect on March 1, 2009.

[40] I have considered the fact that that December 2009 disaffection petition included language at the top of each page stating that the employees who signed the petition were not motivated to do so by Co-

Thus, all of the factors outlined in *Master Slack* demonstrate that Comau's unilateral implementation of its new employee health insurance plan on March 1, 2009, had a causal relationship to the loss of support for the ASW/MRCC and in turn, the December 2009 disaffection petition.[41] The disaffection petition therefore was tainted by the March 1, 2009 unfair labor practice, and it was unlawful for Comau to rely upon the December 2009 disaffection petition as its basis for withdrawing recognition from the ASW/MRCC.

Based on my finding that the December 2009 disaffection petition was tainted by the March 1, 2009 unfair labor practice, I find that Comau committed the following violations:

> By withdrawing recognition from the ASW/MRCC on December 22, 2009 and subsequently refusing to bargain with the ASW/MRCC, Comau violated Section 8(a)(5) and (1) of the Act. *AT Systems West*, 341 NLRB 57, 61 (2004).

> By extending recognition to the CEA and entering into a collective bargaining agreement with the CEA when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau interfered with the formation and administration of a labor organization in violation of Section 8(a)(2) and (1) of the Act. *AM Property Holdings Corp.*, 352 NLRB 279, 281 f n. 10 (2008); *AT Systems West*, supra at 62.

> By giving effect to the union security clause in its collective bargaining agreement with the CEA at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau encouraged membership in a labor organization and discriminated against employees regarding hiring and the terms and conditions of employment, in violation of Section 8(a)(3) and (1) of the Act. *Caldor, Inc.*, 319 NLRB 728, 739 (1995).

I also find that the CEA committed the following violations in connection with Comau's withdrawal of recognition of the ASW/MRCC and recognition of the CEA:

> By accepting recognition from Comau and by entering into a collective-bargaining agreement with Comau when it did not have the uncoerced support of a majority of employees in the bargaining unit, the CEA violated Section 8(b)(1)(A) of the Act. *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 732 (1961); *United Workers of America*, 352 NLRB 286, 286 (2008).

> By maintaining a union security clause in its collective bargaining agreement with Comau at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, the CEA caused and attempted to cause Comau to violate Section 8(a)(3) by encouraging membership in a labor organization and discriminating against employees regarding hiring and the terms and conditions of employment. Through these actions, the CEA violated Section 8(b)(2) of the Act. *Rockville Nursing Center*, 193 NLRB 959, 965 (1971).

B. Comau's and the CEA's Conduct in Asking Employees to Sign Dues-Checkoff Authorization Forms

1. Complaint allegations

In addition to the larger issues (discussed above) related to Comau's decision to withdraw recognition from the ASW/MRCC and recognize the CEA as the exclusive collective-bargaining representative for the bargaining unit, the Acting General Counsel also alleged that both Comau and the CEA violated the Act when they asked employees to sign dues-checkoff authorizations for paying CEA dues.

Specifically, the complaint alleged that in May 2010, Comau threatened employees at the Jefferson North, Novi, and Southfield facilities with termination if they failed to authorize automatic dues-deduction payments to the CEA (in violation of Sec. 8(a)(1) of the Act). (GC Exh. 1(v), pars. 19, 27.) The complaint also alleged that in May 2010, the CEA threatened employees at the Novi and Southfield facilities with loss of employment if they failed to authorize automatic dues deduction payments to the CEA (in violation of Sec. 8(b)(1)(A) of the Act). (GC Exh. 1(v), pars. 23, 28.)

---

mau's unilateral implementation of the health insurance plan. As a preliminary matter, the fact that the drafters of the petition thought such a disclaimer was necessary supports my finding that the health insurance plan and the accompanying premiums remained points of concern for bargaining unit employees. More important, the petition language cannot immunize the petition from the effects of the March 2009 unfair labor practice that the Board found in the earlier *Comau* case, 356 NLRB at 86–87. As indicated above, see fn. 34, supra, the *Master Slack* causation test is an objective, not a subjective, test that evaluates (among other things) the tendency of the violation to cause employee disaffection, and whether the nature of the violation includes the possibility of a detrimental or lasting effect on employees. The subjective views of employees about a past unfair labor practice and its effects are not relevant to the *Master Slack* inquiry.

[41] The cases that Comau and the CEA cited in arguing that Comau's March 1, 2009 unfair labor practice did not cause the ASW/MRCC to lose support are distinguishable. See RE. Brief at 34–35; RU. Br. at 20–23. Specifically, the decisions that the Respondents cited (as examples of cases where the Board or the federal court of appeals held that prior unfair labor practices did not have a causal relationship to the loss of union support) are fact-driven decisions that bear little similarity to this case. See *Champion Home Builders*, 350 NLRB at 791–792 (no causal relationship found where all but one of the unfair labor practices occurred 5–6 months before the disaffection petition, and the record did not show that employees knew about the more recent violation; the nature of violations did not support a finding of taint because they were isolated and/or brief events; the record did not show that the violations had a tendency to cause employee disaffection towards the union; and the record did not show that the scheduling disputes had an adverse effect on employee morale, organizational activity or union membership); *Garden Ridge Management*, 347 NLRB 131, 134 (2006) (same, regarding the effect of a bargaining session scheduling dispute); *Master Slack*, 271 NLRB at 84–85 (same, where the unfair labor practices were committed 8–9 years before the withdrawal of recognition and backpay issues were still being litigated, and there was limited evidence that the backpay dispute had an adverse effect on employee morale, organizational activity or union membership); *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 764 (6th Cir. 2003) (same, regarding the effect of an employer's breach of its duty to collect union initiation fees and its unilateral decision to increase the wages of 6 employees in the 78-employee bargaining unit); see also *Saint Gobain Abrasives*, 342 NLRB at 434 (cited by the CEA, and only standing for the proposition that a hearing is necessary to determine whether the employer's unilateral change to employee health insurance had a causal nexus to employee disaffection).

2. Both Comau and the CEA violated the Act by conduct that reasonably could coerce employees to sign dues-checkoff authorization forms

There is no dispute that under a collective-bargaining agreement that contains a valid union-security clause, an employee may be required to pay union dues as a condition of employment, and may be discharged for failing to pay the required dues. *Longshoreman ILA Local 1575 (Puerto Rico Marine Management)*, 322 NLRB 727, 729 (1996). However, a union may not compel union members to execute dues-checkoff authorizations as a condition of their employment; nor can a union threaten to cause employees to be discharged if they fail to execute dues-checkoff authorizations, because the execution of a dues-checkoff authorization is entirely voluntary. Id. at 729–730 (noting that a union's threat to cause discharge under these circumstances would violate Sec. 8(b)(1)(A)). More generally, a union violates Section 8(b)(1)(A) of the Act if it engages in conduct that may reasonably tend to coerce or intimidate employees in the exercise of Section 7 rights. *Culinary Workers Local 226 (Casino Royale, Inc.)*, 323 NLRB 148, 159 (1997).

Similarly, an employer may not lead employees to believe that the dues-checkoff authorization method for fulfilling their financial obligations to their union is compulsory. *Rochester Mfg. Co.*, 323 NLRB 260, 262 (1997). An employer that directs employees to sign dues-checkoff forms authorizing deduction of dues under the threat of losing their employment has interfered with, restrained, and coerced employees in the exercise of their protected Section 7 rights, in violation of Section 8(a)(1). Id. An employer also violates Section 8(a)(1) of the Act if the employer's conduct or statements have a reasonable tendency to interfere with, restrain, or coerce union or protected activities. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000) (noting that the employer's subjective motivation for the statements is not relevant); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

a. Comau violations

In this case, the facts demonstrate that in May 2010, Comau management personnel spoke with three employees who initially declined to sign dues-checkoff authorization forms: Gaspar Calandrino (Jefferson North field service location); Nizar Akkari (Novi facility); and Jeffrey T. Brown (Southfield facility). Comau Human Resources Director Fred Begle specifically warned Akkari that he could be terminated if he did not sign the form. Site Supervisor Duane Jerore similarly warned Calandrino that he could be disciplined or discharged if he did not sign a dues-checkoff authorization form. See FOF, above, section II(H). Those explicit (and uncontested) statements each violated Section 8(a)(1), as the threat of losing employment or being disciplined had a reasonable tendency to coerce Akkari and Calandrino in the exercise of their protected Section 7 rights to choose whether or not to sign the dues-checkoff authorization forms. *Rochester Mfg. Co.*, supra at 262.[42]

I also find that Begle's statements to Calandrino (in a followup conversation that Jerore joined), and Begle's statements to Jeffrey T. Brown violated Section 8(a)(1). In those exchanges, although Begle did not explicitly link the failure to sign the dues-checkoff authorization form with possible discipline or termination, Begle questioned the employees about their refusal to sign the form, questioned the reliability of paying by other means (such as cash), and (as to Calandrino) warned of consequences that could result if he chose another method of payment and fell behind with his dues. See FOF, above, section II(H). Viewing those statements as a whole, along with the context of Begle taking the unusual step of having a shop floor employee brought to a private office to speak with him (in person as to Brown, and by phone as to Calandrino), I find that Begle's remarks to Calandrino and Jeffrey T. Brown had a reasonable tendency to coerce those employees in exercising their Section 7 rights.

b. CEA violations

The Acting General Counsel also presented evidence about the role that two CEA committeemen (James Kayko and Fred Lutz) played in asking employees to sign dues-checkoff authorization forms.

I recommend dismissing the allegations in paragraph 23(a) of the complaint because the evidence that the Acting General Counsel presented about James Kayko's conduct falls short of proving a violation of Section 8(b)(1)(A). Kayko did ask Akkari to sign a dues-checkoff authorization form, but he did not suggest that any adverse employment action would result when Akkari refused. Kayko did mention that Akkari might be contacted by Fred Begle about the matter, but he did not participate in any ensuing conversations between Akkari and Begle, or suggest that the possible contact with Begle would involve any adverse consequences. See FOF, above, section II(H). Viewing Kayko's conduct as a whole, I find that his actions or statements did not have a reasonable tendency to coerce Akkari to sign the dues-checkoff authorization form.

As for Kayko's interactions with Dave Baloga (also covered by par. 23(a)), I find that both witnesses were equally credible in their respective accounts of Kayko's request that Baloga sign a dues-checkoff authorization form. Since the Acting General Counsel bears the burden of proving the allegations in its complaint by a preponderance of the evidence, the tie between Kayko's and Baloga's testimony leads me to find that the Acting General Counsel did not demonstrate that the CEA (through Kayko) violated the Act in its interactions with Baloga about the dues-checkoff authorization form. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997).

[42] As noted in the statement of facts, I do not give weight to the content of GC Exh. 6, a chain of emails apparently initiated by Jill Opasik regarding employees who had not yet signed a dues-checkoff authorization form. Among other things, the record does not establish Opasik's role as a Comau supervisor or agent, and also does not establish with sufficient reliability that her specific comments reached any bargaining unit employees. See fn. 24, supra. In light of those shortcomings, the exhibit does not demonstrate that Comau violated the Act.

Lutz' interactions with Jeffrey T. Brown are different in character, and do establish that the CEA (through Lutz) violated Section 8(b)(1)(A). (See GC Exh. 1(v), par. 23(b).) Lutz' initial requests that Brown sign a dues-checkoff authorization form were merely requests that were not linked to any threat of adverse employment action. However, when Brown refused to sign the form, Lutz escorted Brown to Begle's office, and also participated in Begle's meeting with Brown. Lutz' presence at the meeting served as a CEA endorsement of Begle's remarks and of Begle's treatment of Brown's refusal to sign the dues-checkoff authorization form as a point of concern. Further, like Begle, Lutz questioned the reliability of paying dues by means other than dues checkoff. Taking the totality of the circumstances into account, Lutz' conduct and statements to Jeffrey T. Brown had a reasonable tendency to coerce Brown to sign the dues-checkoff authorization form, and thus violated the Act.

3. Comau did not cure its violations of the act regarding dues-checkoff authorization forms

As part of its response to the allegations in the complaint regarding the dues-checkoff authorization forms, Comau contends that any violation that Begle committed was cured by the June 2010 memorandum that Comau posted in the workplace. (RE. Br. at 25 (citing RE. Exh. 9(b).)[43] In so arguing, Comau invokes *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), which explains that an employer may relieve itself of liability for unlawful conduct in some circumstances by repudiating the conduct. Id. at 138. To be effective, the repudiation must be: timely; unambiguous; specific in nature to the coercive conduct; adequately publicized to the employees involved; free from other proscribed illegal conduct, and accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future. Id.; see also *Cintas Corp.*, 353 NLRB 752, 753 fn. 8, 769 (2009). The employer also must not engage in proscribed conduct after the repudiation. Id.

Comau's effort at repudiation (sent by Begle) read as follows:

> The ASW has charged that our employees have been coerced into signing dues authorization forms. We have investigated this allegation and do not believe it to be factually accurate. Just to be sure that everyone understands their rights, however, we want to confirm the following:
>
> While the contract contains a requirement that employees become dues paying members, the contract does not require that dues be paid through a payroll deduction authorization, with dues to be withheld by the Company from your paycheck. It is up to you whether you wish to authorize payment of your dues in that manner.
>
> In the event anyone signed a dues deduction authorization form under the mistaken assumption that the Company required this, you should feel free to rescind the authorization and deal with the CEA directly. In that event, please so indicate to me in writing.

(RE. Exh. 9(b).) The repudiation does not satisfy the standard set forth in *Passavant* because (among other things) it was not specific to the nature of the misconduct. The memo makes no reference to the threats of termination that Comau communicated to employees, nor does it address the other actions and statements that Comau took that had a reasonable tendency to coerce employees to sign the dues-checkoff authorization forms in the first instance. The attempted repudiation was therefore incomplete.[44] Accordingly, my finding that Comau violated Section 8(a)(1) of the Act remains unchanged.

CONCLUSIONS OF LAW

1. By withdrawing recognition from the ASW/MRCC on December 22, 2009, as the bargaining unit's exclusive collective-bargaining representative, Comau violated Section 8(a)(5) and (1) of the Act.

2. By extending recognition to the CEA as the bargaining unit's exclusive collective-bargaining representative on December 22, 2009, when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau violated Section 8(a)(2) and (1) of the Act.

3. By entering into a collective-bargaining agreement with the CEA (effective December 22, 2009) when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau violated Section 8(a)(2) and (1) of the Act.

4. By giving effect to the union-security clause in its collective-bargaining agreement with the CEA (effective December 22, 2009) at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, Comau encouraged membership in a labor organization and discriminated against employees regarding hiring and the terms and conditions of employment, in violation of Section 8(a)(3) and (1) of the Act.

5. By telling employees at the Novi and Jefferson North facilities in May 2010 that they could be disciplined or discharged if they did not sign dues-checkoff authorization forms, Comau interfered with, restrained, or coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.

6. By making statements to employees and engaging in conduct in May 2010 that had a reasonable tendency to coerce employees at the Southfield and Jefferson North facilities to sign dues-checkoff authorization forms, Comau interfered with,

[43] The CEA did not address the substantive issues concerning the dues-checkoff authorization forms in its posttrial brief. It did, however, deny the allegations in its answer to the complaint. The record does not show that the CEA repudiated (or attempted to repudiate) any violations associated with the dues-checkoff authorization forms. The CEA did issue a letter of understanding (that authorized payment by cashier's check under certain parameters), but the letter of understanding did not address or repudiate any previous violations of Sec. 7 rights.

[44] Comau's memorandum was also ambiguous because it did not address restrictions that the CEA placed (with Comau's tacit consent) on other forms of payment. In a letter of understanding, the CEA advised the unit that any employee who elected not to use dues checkoff was required to pay dues by hand delivering a certified cashiers check to Harry Yale, Fred Lutz, or Jeffrey H. Brown. Comau was aware of the restrictions that the CEA imposed (since Yale presented the letter of understanding to Begle for review), and essentially acquiesced to the restrictions by allowing them to persist even after Comau issued its June 2010 memo. See FOF, above, sec. II(I).

restrained, or coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.

7. By accepting recognition from Comau on December 22, 2009, as the bargaining unit's exclusive collective-bargaining representative when it did not have the uncoerced support of a majority of employees in the bargaining unit, the CEA violated Section 8(b)(1)(A) of the Act.

8. By entering into a collective-bargaining agreement effective December 22, 2009, with Comau when it did not have the uncoerced support of a majority of employees in the bargaining unit, the CEA violated Section 8(b)(1)(A) of the Act.

9. By maintaining a union-security clause in its collective-bargaining agreement with Comau (effective December 22, 2009) at a time when the CEA did not represent an uncoerced majority of employees in the bargaining unit, the CEA caused and attempted to cause Comau to violate Section 8(a)(3) by encouraging membership in a labor organization and discriminating against employees regarding hiring and the terms and conditions of employment. Through these actions, the CEA violated Section 8(b)(2) of the Act.

10. By making statements to employees and engaging in conduct in May 2010 that had a reasonable tendency to coerce employees at Comau's Southfield complex to sign dues-checkoff authorization forms, the CEA restrained or coerced employees in the exercise of Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.

11. The unfair labor practices stated in conclusions 1–10 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and(7) of the Act.

12. I recommend dismissing the allegations stated in paragraph 23(a) of the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. While most of the remedies that I will require will be set forth in the Order attached to my decision,[45] the Acting General Counsel's request for an affirmative bargaining order requires specific attention.

The Board consistently has held that an affirmative bargaining order is the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees. *Caterair International*, 322 NLRB 64, 68 (1996). Applying that principle, the Board recently ruled that an affirmative bargaining order was warranted as a remedy for an employer's unlawful withdrawal of recognition from a union. *Vincent/Metro Trucking*, 355 NLRB 289 (2010). In so ruling, the Board examined the facts of the case under District of Columbia Circuit precedent that states that an affirmative bargaining order must be justified by reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representative; and (3) whether alternative remedies are adequate to remedy the violations of the Act. Id. (citing *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000)).

Adhering to the Board's approach, I have analyzed the facts of this case under the three-factor balancing test outlined by the District of Columbia Circuit.

> (1) An affirmative bargaining order in this case will vindicate the Section 7 rights of the employees who supported the ASW/MRCC and were denied the benefits of that union's collective-bargaining by Comau's unlawful decision to withdraw recognition. To the extent that some employees may still oppose the ASW,[46] an affirmative bargaining order will not unduly prejudice their Section 7 rights because the affirmative bargaining order is temporary. In addition, it bears repeating that Comau committed an unfair labor practice that had a causal relationship to ASW/MRCC's loss of employee support, and thus to the December 2009 disaffection petition that served as the springboard for Comau to withdraw recognition.[47] Under those circumstances, it is only by restoring the status quo ante and requiring Comau to bargain with the ASW for a reasonable period of time that employees will be able to fairly decide for themselves whether they wish to continue to be represented by the ASW.
>
> (2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. It removes Comau's incentive to delay bargaining in the hope of further discouraging support for the ASW. It also ensures that the ASW will not be pressured, by the possibility of another decertification or disaffection petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice and the issuance of a cease-and-desist order.
>
> (3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy Comau's and the CEA's violations, because it would permit a decertification petition to be filed before Comau had afforded the employees a reasonable time to regroup and bargain through the ASW in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where the nature of Comau's unfair labor practice

[45] To the extent that I will require Comau and the CEA to reimburse bargaining unit members for the CEA fees and dues that were collected unlawfully on or after December 22, 2009, that remedy is required because the CEA collective-bargaining agreement and union-security clause were unlawful. I will also require Comau and the CEA to reimburse bargaining unit members for daily compound interest on any such reimbursement amounts as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). I will not require any reimbursement of CEA dues based on the violations associated with coercion in obtaining dues-checkoff authorization forms. See *Rochester Mfg.*, 323 NLRB at 263 (no reimbursement required if affected employees were subject to a lawful union-security clause obligating them to pay dues).

[46] After Comau withdrew recognition, the ASW changed its affiliation (in March 2010) from the MRCC to the CIC. Both entities are part of the United Brotherhood of Carpenters.

[47] The Board's decision concerning this unfair labor practice (the March 1, 2009 unilateral implementation of a new health care plan for employees) also contains an affirmative bargaining order. *Comau*, 356 NLRB at 87.

> likely created a lasting negative impression of the ASW in the bargaining unit, and where Comau immediately recognized a replacement union (the CEA) that has been able to develop relationships with bargaining unit employees while the ASW litigated its charges. I find that those circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose ASW's continued union representation.

See *Vincent/Metro Trucking*, supra at 1–2 (citing similar issues that weighed in favor of an affirmative bargaining order); *Spectrum Health-Kent Community Campus*, 353 NLRB 996, 996–997 (2009) (same); *AT Systems West*, 341 NLRB at 63 (same). Based on my analysis under the three-factor balancing test applied by the Board, I find that an affirmative bargaining order with a temporary decertification bar for a reasonable period of time is necessary in this case to fully remedy Comau's unlawful withdrawal of recognition of the ASW.[48]

[Recommended Order omitted from publication.]

[48] I have considered the fact that after Comau withdrew recognition from the ASW/MRCC, the ASW subsequently (in March 2010) changed its affiliation from the MRCC to the CIC (still within the United Brotherhood of Carpenters). The CEA suggests that the bargaining unit should not be forced to accept the ASW/CIC as its bargaining representative, since the unit did not vote to affiliate with the CIC. While the CEA's argument has some superficial appeal, I find that as an equitable matter, the ASW should not be penalized for continuing to conduct its operations while this litigation was pending. It should come as no surprise that the ASW made various decisions (including the decision to affiliate with the CIC) since December 22, 2009, the date that Comau withdrew recognition. To the extent that the bargaining unit may be unfamiliar with (or skeptical of) some of the changes that the ASW has made, it will be up to the ASW to persuade the unit (while the affirmative bargaining order is in effect, and beyond) that the changes are beneficial.